Supreme Court, U.S.
FILED

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH SCHWARTZ

Respondent,

v.

KAREN A. MURPHY AND
KATHLEEN A. MURPHY

Petitioners.

On Petition for a writ of Certiorari to the Supreme Court of Connecticut

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May state instrumentalities take airspace above a person's residential shorefront land for the sole express purpose of improving the water view of a single neighboring private landowner?

Since there is no direct right of appeal to the U.S. Supreme Court, how do property owners have a purely private taking that was affirmed by the state's highest court voided pursuant to *Hawaii Housing Auth. V. Midkiff*, 467 U.S. 229, 245 (1984)?

Whether there are limits to a court's authority to misstate or omit material facts, omit material authorities, and issue rulings with no reasoning and, if so, how those limits should be defined and enforced?

PARTIES TO THE PROCEEDINGS

Petitioners, who were defendants below, are Karen A. Murphy and Kathleen A. Murphy.

Respondent, who was the plaintiff below, is Kenneth A. Schwartz.

RULE 29.6 DISCLOSURE STATEMENT

None of the Petitioners is a corporation.

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OPINIONS AND ORDERS ENTERED IN THIS CASE BY THE COURTS

The opinions and orders of the Connecticut state courts of which review is sought are:

(1) The unpublished decision of the Superior Court of Connecticut, Judicial District of Stamford, dated August 30, 2001 and which is reproduced in the Appendix at App.5.

(2) Appellate Court's Order denying Defendants' Motion for Review, filed December 20, 2001, which is reproduced in the Appendix at App. 14.

(3) The decision of the Appellate Court of Connecticut which is reported at *Schwartz v. Murphy et al.*, 74 Conn. App. 286 (2002) and reproduced in the Appendix at App. 15-26.

(4) Superior Court's 3-page Proposed Order dated July 14, 2003, which Order is identical to the one submitted ex parte by Plaintiff's Counsel (App. 106), and which is reproduced in the Appendix at App. 27.

(5) Superior Court's Memorandum of Decision, and Judgment File, both dated October 9, 2003 and which are reproduced in the Appendix at App. 30-38.

(6) Superior Court's "Memorandum Re: Articulation/Termination dated May 27, 2004 which is reproduced in the Appendix at App. 39-42.

(7) Appellate Court Four Orders dated 7/13/04, which, *inter alia*, granted the "portion of the motion [allegedly] requesting dismissal of the appeal as frivolous," and which are reproduced in the Appendix at App. 43-46.

(8) Order from the Appellate Court dated September 13, 2004 granting Defendants' Motion For Reconsideration En Banc dated July 21, 2004 and which is reproduced in the Appendix at App. 47.

(9) Order from the Appellate Court dated October 20, 2004 dismissing the Appeal and which is reproduced in the Appendix at App. 48.

(10) The Order from the Appellate Court dated December 16, 2004 denying Petitioners' Motion for Reconsideration En Banc dated October 28, 2004 and which is reproduced in the Appendix at App. 49.

(11) *Schwartz v. Murphy*, 273 Conn. 912 (2005) decision, dated March 2, 2005, denying Petitioners' Petition for Certification and which is reproduced in the Appendix at App. 50.

JURISDICTION

In a decision released on December 24, 2002 (App. 15), the Connecticut Appellate Court affirmed in part, and reversed in part, the judgment of the trial court.[1] Following remand, the final decision and judgment of the Superior Court of Connecticut, Judicial District of Stamford was entered on October 9, 2003 (App. 30-38). The Appellate Court of Connecticut dismissed Petitioners' Appeal of this final decision and judgment on

[1] Shortly after the Appellate Court released its December 24, 2002 decision, the Defendants filed a Petition for Certification which was denied by the Connecticut Supreme Court on April 3, 2003.

December 16, 2004. (App 49). The Petition for Certification to the Supreme Court of Connecticut filed by the Petitioners was denied on March 2, 2005. (App. 50). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

Petitioners contend that the Connecticut courts' decisions rests on an erroneous, factually unsupportable, unconstitutional interpretation of the City of Stamford's Planning Board's letter of June 14, 1978, and, not only involves the knowing and deliberate misrepresentation and omission of the material facts and omission of law on which the case pivots, but also a judicial process where elementary legal principles, rules of evidence, standards of conduct simply ceased to exist. They also claim that the due process and equal protection violations encountered and the judgment sought and secured by Respondent, along with the relief that flows from that ruling, are invalid under the United States Constitution, and conflicts this Court's Fifth and Fourteenth Amendment precedents. Petitioners properly raised these federal claims in the courts below:

- Appendix (Petition for Certification to the Supreme Court of Connecticut) at 257-273;

Schwartz v. Murphy 263 Conn 908 (2003).

- Appendix (Motion for Reconsideration En Banc filed in the Appellate Court on November 1, 2004) at 242-256;
- Appendix (Motion For Review of the Superior Court's "Memorandum Re: Articulation/Termination" dated May 27, 2004, which, inter alia, denied Defendants' Motions for Articulation and Rectification) at 178-184; 186-189;
- Appendix (Defendants' Motion for Review Of Decision To Grant Plaintiff's "Motion To Terminate Stay And For Costs" dated 6/4/04) at 191-192;198-204.
- Appendix (Defendants Appellants' Memorandum of Law Citing Reasons Why The Appeal Should Not Be Dismissed As frivolous) at 225-240;
- Appendix (Motion for Reconsideration En Banc, dated July 21, 2004 and filed in the Connecticut Appellate Court on July 23, 2004) at 207-211; 216-221;
- Appendix (Motion for Disqualification of Judicial Authority) at 162-168;

  Appendix (Defendants' Motion For Review filed December 20, 2001) at 60-68.
- Appendix (Motion to Object to the Proposed Order Contained in the Notice Dated July 14, 2003) at 73-84;
- Appendix (Defendants' Reply To Plaintiff's Response To Defendants' Motion To Object To The Proposed Order Contained In The Notice Dated July 14, 2003) at 102-104;
- Appendix (Motion for Articulation) at 134-140;
- Appendix (Motion for Rectification) at 112 fn 1; 118-127;
- Appendix (Opposition to Motion to Terminate Stay and for Costs, dated 11/18/03) at 150-154;
- Appendix (Reply to Defendant's Opposition to Plaintiff's Motions-11/21/03, where Plaintiff acknowledges outstanding reformation issues) at 172.

Accordingly, the questions to be presented in the petition plainly fall within the jurisdiction of this Court under 28 U.S.C. § 1257(a).

The judgment below is plainly final for purposes of this Court's certiorari jurisdiction. As this Court has long recognized, "Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '[f]inal judgment or decree.' Title 28 U.S.C. 1257 retains this limitation on our power to review cases coming from state courts." (internal citations omitted) *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Unlike the status of the case following the release of the Appellate Court decision on December 24, 2002, where the trial court was reversed in part, no further proceedings remain to be held in the state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "No person shall be… be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. " U.S. CONST. amend. V. (App. 51)

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Pursuant to this Court's Rule 14.1(f), the provisions of Connecticut Rules of Court ("Connecticut Practice Book") involved in this case are reproduced in the Appendix at 52.

STATEMENT

On September 15, 2000, more than 22 years after the City of Stamford Planning Board approved a June 1978 subdivision involving the Defendants' property, the Plaintiff commenced the present action against the Defendants alleging that the Defendants' property, which is located on Plaintiff's southern border, is subject to a view easement in his favor. Plaintiff testified that at the time he acquired his property in 1984 and thereafter, the defendants' predecessors-in-interest did not trim the more than 22 year old hedges or the more than 40 year old tree to what we now know

was a falsely alleged six foot limitation. The extrinsic evidence, (see fn 5 herein) which the trial court first misstated and then excluded from its consideration, shows that the alleged six foot limitation applies to the 1998 subdivision of the property located on the eastern border of Plaintiff's property. The Planning Board's conditions to the 1998 subdivision also state that the six foot limitation does not apply to the existing plantings. (App.89, p. 11)

Notwithstanding the foregoing, the Defendants appealed a Trial Court decision (App. 5) which found that a view easement exists over Defendants' property and granted a mandatory injunction in favor of the Plaintiff. On December 24, 2002, the Appellate Court issued its opinion (App.15), affirming, in part, and reversing, in part, the judgment of the Trial Court.

The Appellate Court ruled that the Trial Court "properly determined that a view easement exists over the defendants' property [which was impose by the City of Stamford's Planning Board letter of June 14, 1978 (App. 21)][2] for the benefit of the

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[2] The record is void of any facts explaining the Planning Board's June 14, 1978 letter (App.100). That letter was part of Plaintiff's Exhibit 16, which was submitted one week after the trial and was different from Plaintiff's Exhibit 16 identified at trial. (App. 64) The Plaintiff had certified the Planning Board file. The individual

plaintiff's [a private party (App. 24, fn 3)] property " (App.17), but that "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement" (App. 24). The case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (App.24).[3] Upon remand, the

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documents and maps within the file where neither certified nor authenticated. Some of the file documents did not have signatures. Further, any person could access this file without supervision and the Record shows that documents were removed from, and other documents inserted into, the file. Moreover, the Plaintiff called no witnesses other than himself; did no discovery; wrote an eight ¶ complaint (App. 274) which never mentioned the June 14, 1978 letter or the private Dunaway-Contegni Agreement or any right he was claiming under the letter or the Agreement. The Plaintiff subsequently acknowledged, in an *ex parte* communication, that the six foot height limitation allegation in the complaint (i.e., ¶ 5) was false (App. 278). It is undisputed that the Plaintiff has no rights under, and is not subject to the burdens of, the Defendants' deed or the referenced maps. Both the Appellate Court and the Trial Court decisions confirm that Plaintiff's complaint fails to state a claim, and that the Plaintiff did not plead a reformation of the multi-party, Dunaway-Contegni Agreement. (App. 274).

[3] There is no dispute that (i) there is a triangular restriction in the northeast corner of Defendants' property; (ii) the source of that restriction is the Planning Board's letter dated June 14, 1978; (iii) the bushes and the tree in the restricted area were there long before the restriction/easement; (iv) neither the words "easement" nor "view easement" appear in the Defendants' deed, related maps or the Dunaway-Contegni Agreement; and (v) the Plaintiff's rights

Defendants sought, consistent with the mandate (see fn. 16 herein), to have the relevant extrinsic evidence considered by the court. [4]

The Trial Court, however, first misstated the relevant extrinsic evidence and then excluded this material evidence from

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regarding the restriction/easement emanate from ¶ 3 of the Dunaway-Contegni Agreement (App.17), which states: "No dwelling, accessory structure or view obstruction shall be located in the triangular area 50' x 95' x110' at the Southwesterly corner of said premises." (App.286). The terms of the servitude in the Dunaway-Contegni Agreement are not ambiguous. But assuming that they are, if the laws are to be applied equally to all, then the Court must consider the relevant extrinsic evidence (See fn. 5 herein) to solve the ambiguity. The Appellate Court found that one could misread the applicable maps (App.20), but there is no reference to any map in the Dunaway-Contegni Agreement and there are absolutely no misunderstandings in that Agreement regarding the direction of north, south, east or west. (App.285). Further, the Dunaway-Contegni Agreement and the Defendants' deed make references to restrictive covenants, not to any view easement. (App.287). The concessions made to the owners of Plaintiff's property at the time of the subdivision, which did not include a view easement, were clearly noted in the Dunaway-Contegni Agreement. *See* App. 228-234 for additional facts and analysis.

[4] Notwithstanding that the lower court's decision engages in a lengthy analysis of the location of the restriction, the interpretation of defendants' deed and the maps referenced in defendants' deed are not at issue. The Planning Board of the City of Stamford and the Defendants agree, and the extrinsic evidence shows, that at the June 1978 Planning Board meeting a restriction was placed in the northeast corner of the Defendants' property, not the southeast corner. What is at issue is the courts' finding that the restriction/condition the Planning Board of the City of Stamford imposed is a view easement for the sole benefit of the Plaintiff.

its consideration.[5] The Trial Court incredulously interpreted the Appellate Court's mandate to mean: "The only thing that remained for this court [upon remand] was the entry of [a non-appealable] judgment." (App.40).[6] On its face, the Trial Court's Judgment File (App.35) failed to even address the rights of the Defendants, let alone render any determinations. This failure to comply with the Appellate Court's broad mandate is not surprising given that Plaintiff's counsel drafted the Judgment File and then submitted it to the Trial Court in an *ex parte* communication. (See fn. 19

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[5] The extrinsic evidence (App. 87-101), which is explained at App. 74-78, shows that (i) the June 14, 1978 Planning Board letter is the source of the restriction in the northeast corner of Defendants' property; (ii) the Planning Board never required property owners to cut existing plantings at the time when such restrictions were imposed, and (iii) the admitted, falsely alleged six foot height limitation pertains to the property located on the eastern boundary of Plaintiff's property. The Trial Court's misstatement of the foregoing is at App.33. Ironically, the City of Stamford is now requiring the Defendants, for environmental reasons, to plant 33 plants in the northeast corner of their property, the restricted area.

[6] In this Memorandum (App.39), the Trial court further states that "[t]his court denies the defendants' motion for articulation or rectification of its memorandum of decision dated October 9, 2003, because all the issues in this controversy about the view easement were fully litigated and this case is over and finished" (App. 40) and "[t]hey have had their day in court." (App. 42) As depicted in this Petition and shown in the Appendix at 186, several material property rights issues have not been addressed by the Courts and the Defendants have not had a day in court with due process.

herein). The Defendants then claimed on appeal that the Trial Court did not comply with the mandate remand of the Appellate Court. Without a reasoned decision or hearing, the appeal was dismissed as frivolous on October 20, 2004 (App. 48).[7] The Appellate Court's one-sentence Order dated October 20, 2004, which prevents analytical scrutiny against the record evidence, together with the Appellate Court Orders of July 13, 2004, sends a chilling message to all litigants that documented misconduct issues should not be raised on appeal. Petitioners' Motion for Reconsideration En Banc and Petition For Certification to the Supreme Court of Connecticut were denied on December 16, 2004 (App. 49) and March 2, 2005 (App. 50), respectively.

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[7] Prior to the dismissal, the Trial Court and Appellate Court made rulings that were in direct conflict with the Practice Book. *See* App. 206 and 190. In connection with Defendants' prior motions which resulted in the Orders issued on July 13, 2004 (App. 43-46), Paul Hartan, the Deputy Chief Clerk at the Appellate Clerk's office, confirmed that the Honorable Thomas A. Bishop and the Honorable Ian McLachlan were on the panel that issued the Orders on July 13, 2004. Yet, during oral argument in the separate zoning case, Judges Bishop and McLachlan stated that they were not involved in the July 13, 2004 Orders. Moreover, following the Orders of July 13, 2004, Judge Flynn, without explanation, recused himself from the case at bar. (see App.47, 48, 49) Notwithstanding the foregoing, and although requested (App 156) the Trial Judge would not recuse himself from the case.

Listed below are the deed reformation issue questions pertaining to Defendants' property, which the Plaintiff acknowledges,[8] and which were not addressed by the Judgment File and which relate directly to the Appellate Court mandate regarding a determination of rights and obligations in connection with the view easement:

(1) Did the Trial Court's decision eliminate two easements (i.e., one in the southeast corner of Defendants' property, as the Court found in the Planning Board letter of June 14, 1978 (App.100) and Defendants' deed (App.280); and the one the Court found on the southwestern corner of a third party's property, as stated in the unpled Dunaway-Contegni Agreement (App.286))?

(2) Did the Trial Court decision subject the Defendants' property to two easements (i.e., one in the northeast as shown on the applicable maps (App.282), and one in the southeast corner of the property as noted above)?

(3) Are the dimensions of the view easement as shown on the applicable maps (App.282) or as stated in the Dunaway-Contegni Agreement (App.286), and what is the basis for this decision?

(4) Are the notations on the relevant maps and the Dunaway-Contegni Agreement, in place for more

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[8] The Plaintiff stated that "[t]hese [reformation] issues ["more precise delineation of the easement area, to reform the deeds in question so that the land records are clarified, to require additional notifications, and to clarify whether or not the hedge can be trimmed below six feet"] will be heard in due time ...." (App. 172).

> than 20 years, to be changed to reflect the Trial Court judge's determination that the "plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet and to trim the elm tree so that it is maintained at approximately the same height as shown in exhibits 12 and 13 ...." (App.37). If so, what is the authority for these reformations. What are the rights of the other parties to the Agreement and are they entitled to notification of the fact that the Agreement has been reformed?

The Trial Court also issued an unclear Judgment File (App.35),[9] which fails to determine the Defendants' rights. In summary, the Defendants contend that the illegal injunction initially imposed by the Trial Court was more favorable to their rights than the Judgment File, which was written by Plaintiff's

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[9] The Judgment File states that "[t]he plaintiff has the right to trim the hedge and other bushes ... to a maximum height of six (6) feet," which means the Plaintiff can trim the hedge and bushes to less than an inch, effectively removing them. (App. 37). The Appellate Court implied that, if the facts and law support it, "if the hedge and other bushes ... are kept at a height of six feet ..., there is no impingement on the plaintiff's view ...." (App.26, at fn 8). (emphasis added). This is a materially different instruction to the Trial Court than it adopted. Note that plaintiff acknowledges this discrepancy as well. *See* fn 8 herein. The Judgment File further provides that the Plaintiff can enter Defendants' property "only at reasonable times and not on weekends." (App.38). Thus, if the Defendants were hosting an event, a holiday gathering, a party, or a fund-raiser during a weekday, they would not be entitled to notice under the terms of the Judgment File and trimming and pruning would be permitted.

counsel in an *ex parte* communication.

A. The Defendants' rights under the United States Constitution were violated when the Connecticut lower courts found that the Stamford Planning Board, a government agency, took the Defendants' private property and gave it to another private party for such party's personal use.

The record shows, and the extrinsic evidence confirms, that the City of Stamford did not create the restriction on Defendants' property for the benefit of the Plaintiff, another private party.[10] The courts below, however, improperly concluded that the City imposed a view easement on Defendants' property. Even if the City did impose the easement, which it did not, it would be an unconstitutional taking of Defendants' property because, as the Court found, any public benefit from the taking would not only be secondary to the private benefit, but "difficult to discern the identity of any other beneficiary." (App.24 at fn 3)."[11]

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[10] *See* fn 5 herein.

[11] The Appellate Court (i) found that "in granting that subdivision application, the planning board, inter alia, imposed a condition that a triangular area in the [northeast] corner of what is presently the defendants' property be subject to a view easement." (App.21); and then (ii) favorably cited the Trial Court's observation that "if the view easement is not for the benefit of the plaintiff's property [a private party], it is difficult to discern the identity of any other

There is no case in which a governmental agency, including the judicial branch, took or transferred private property from one private party owner to another, that has ever been held to be a constitutional exercise of government power in any state of the union. Yet, as the record here shows, that is exactly what has happened in this case. If the lower courts' ruling stands, the private property of the Defendants, in the form of a view easement, will have been transferred to the Plaintiff, another private party.[12]

Finally, even if it is held that, under the facts of this case, a governmental agency can take private property from one private party and transfer it to another, the relevant extrinsic evidence shows that the tree and/or the hedges would not have to be cut or trimmed in the maintenance of the easement. See fn 5 herein. Further, it would be discriminatory for the Planning Board to require the Defendants to cut or remove their existing plantings when such demands are not made of similar situated property owners (see Extrinsic evidence, in particular, paragraph 11 for Conditions of Subdivision Appl. No. 3707 at App. 89). *Village of*

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beneficiary." (App. 24 at fn 3).

[12] *See Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500

Willowbrook v. Olech, 528 U.S. 562 (2000).

Petitioners also seek review by this Court of the constitutional equal protection and due process violations encountered by the Defendants in this case.

B. The Connecticut Court decisions violated the Defendants' rights to equal protection of the laws and due process under the United States Constitution.

The Defendants were denied equal protection under the laws. Specifically, the lower courts (i) effected a *de facto* reformation of Defendants' deed, not in accordance with the law for deed reformations,[13] but by use of footnotes and theories of "typographical" and "scrivener's" errors with not a scintilla of

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(2004).

[13] A deed reformation must be specifically pled or it will not be adjudicated. *Homeowners Loan Corporation v. Nasaitko*, 129 Conn. 19 (1942) and *Harris v. Clinton*, 138 Conn. 657 (1952). Plaintiff failed to plead a deed reformation.(App.274) The standard of proof for a deed reformation is considerable. It requires evidence that is "clear, substantial and convincing." *Lopinto v. Haines*, 185 Conn. 527 (1981). Further, a reformation will only be effected where the document itself is ambiguous. *F. & AK, Inc. v. Sleeper*, 161 Conn. 505 (1971). There is no ambiguity within the Dunaway-Contegni agreement and the Courts below found no ambiguity in the Dunaway-Contegni agreement. Even if the plaintiff had properly plead an action in deed reformation, the evidence does not support such action. The Dunaway-Contegni agreement is clear, consistent and unambiguous.

testimonial evidence, no notice or opportunity for the Defendants and other third parties to be heard on this deed reformation, and with unauthenticated and unexplained documents;[14] (ii) ignored the well settled Connecticut case law which recognizes that the reversal of an order of the Superior Court renders that order completely void, and puts the parties back in the positions they occupied before the original action was brought;[15] (iii) failed to follow the remand order and the law by excluding the relevant extrinsic evidence from consideration;[16] (iv) disregarded the law that a judgment establishing the terms of the servitude should be so precise and definite in its terms that the parties may clearly understand what acts are to be done by them on the one side and

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[14] *See* fn 2 herein.

[15] *See* Judge Lavery's summary of the general rule regarding reversals in his dissent in *Mulholland v. Mulholland*, 31 Conn. App. 214, 624 A.2d 379 (1993).

[16] In its opinion, the Appellate Court clearly noted and the law states that "[i]f the meaning of the language contained in a deed or conveyance is not clear [e.g., the terms of the Planning Board letter referenced in Defendants' deed], the trial court is bound to consider any relevant extrinsic evidence presented by the parties ...." (App.18). (emphasis added). *Mulla v. Maguire*, 65 Conn. App. 525, 531-32, cert. denied, 258 Conn. 934 (2001)

the other, and how their rights are determined;[17] (v) did not follow the Connecticut Supreme Court's holdings in *Texaco, Inc.* v. *Golart*, 206 Conn. 454, 464 n.7, 538 A.2d 1017 (1988), because the issues raised by Defendants on appeal (e.g., the inappropriate reformation of Defendants' deed, applicable map notations, and the private Dunaway-Contegni Agreement; misapprehension of the facts; and judicial and attorney misconduct) do not fall within the definition of frivolous as set forth in *Texaco*;[18] and (vi) overlooked all of the law and the facts regarding judicial and counsel misconduct.[19]

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[17] *See Goldberg v. Krayeske*, 102 Conn. 137, 144, 128 A.27 (1925).

[18] The dismissal also conflicts with the Appellate Court's holdings in *Connecticut National Bank v. Zuckerman*, 1 Conn. App. 440, 441-42 (1993) (where the appellant filed an appeal challenging the trial court's refusal to act beyond the scope of the remand order). Here, the Defendants filed the appeal because the Trial Court did not comply with the remand order.

[19] For example, an ex *parte* communication raises a rebuttable presumption of prejudice. Once the Defendants show an improper *ex parte* communication has occurred, the burden of showing that the communication was harmless shifts to the party seeking to uphold the validity of the decision. *Daniel v. Zoning Commission of the City of Norwalk*, 35 Conn. App. 594,645 A.2d 1022. The Defendants were harmed by the *ex parte* communication, wherein the Plaintiff's counsel drafted a Judgment File (See App.102-104; 163-165; 105-109; Compare App.27-29 to App.106-107; 33-34), which completely ignored the Defendants' rights in connection

The Defendants were also denied due process.[20] At nearly every stage in the case, the Defendants were denied the opportunity to contest the basis upon which the lower courts sought to deprive them of their property rights.[21] Further, the lower courts took Defendants' property without appropriate justification. For example, the Connecticut Courts (i) without any evidence in the record,[22] interpreted numbered ¶ 2 of the Planning Board's June 14, 1978 letter as creating a view easement for the Plaintiff, a private party; (ii) by dismissing the appeal, sanctioned the Trial

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with the restriction/easement. *See* App.35; and by the admission of Plaintiff's Exhibit 16. *See* fn 2; also see Plaintiff's Reply, filed without permission, to Defendants' Reply. (App.277)

[20] "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Procedural due process rules are intended to protect people from the mistaken or unjustified deprivation of life, liberty, or property, not from the deprivation. The rules are meant to minimize substantively unfair or erroneous deprivations by enabling individuals to contest the basis upon which a state/governmental agency proposes to deprive them of protected interests. Substantive due process guarantees not only that appropriate and just procedures be used whenever the government is taking away a person's life, freedom or property, but also guarantees that a person's life, freedom and property cannot be taken without appropriate governmental justification, regardless of the taking procedures used.

[21] Excluded from evidence Defendants' relevant and material extrinsic evidence-see fn 5 herein; see also fn 26 herein.

Court's misstatement of the relevant extrinsic evidence, and the preclusion of same from consideration;[23] (iii) circumvented the law for deed reformations by using typographical and scrivener's error theories (App. 25 at fn 6)[24]; (iv) permitted the Plaintiff to recover under a cause of action not pled;[25] (v) effectively denied all of Defendants' Motions for Articulation, Rectification and Review;[26] (vi) in a one-sentence Summary Order without opinion (App. 48), summarily dismissed the Defendants' direct appeal as frivolous without conducting a hearing under PB § 85-1;[27] and (vii)

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[22] *See* fn 2 herein.

[23] *See* fn 5 herein.

[24] Even if one accepts the scrivener's error theory for the location of the restriction, no reasonable court would accept such a theory to rewrite the notations on the relevant maps and the Dunaway-Contegni Agreement, in place for more than 20 years, to conform to the Trial Court's Judgment File, which effectively has been done in the case at bar, although that is even unclear. See fn 2 at App. 12 for the basis for trimming the tree.

[25] Plaintiff's complaint (App.274) has not been amended to add the unpled Dunaway-Contegni Agreement, which all parties agreed must be done. App. 60-61. Also *see* fn 3.

[26] *See* App. 39-42; 43-46; 47. By denying the Motion of the Defendants', filed December 20, 2001, for review of photoduplicated record (App.14), the Appellate Court was able to dismiss Defendants' claims as not supported by the record. (App. 24 at fn 1). *See* PB § 68-3-note record versus case file, and App.55.

[27] The Defendants were never granted a hearing, as required by PB

sanctioned *ex parte* communications (See fn 19 herein). In summary, the Connecticut courts below have committed such substantive and procedural violations of the law and have so far departed from the accepted and usual course of judicial proceedings in this case, as to call not only for a reversal of the decision and judgment for the defendants but also to question whether the judicial and attorney conduct in this case comports with that required for this Court to justifiably rely on Connecticut's state courts to fulfill its constitutional role as primary guarantors of federal constitutional rights?

In conclusion, the Defendants request that this Petition For Certification be granted for the reasons set forth below and on the basis of the facts and legal issues stated above.

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§ 85-3, before the imposition of the ultimate sanction. Instead, the Appellate Court listed the appeal on its own motion calendar (App. 47) "as to whether or not the appeal should be dismissed as frivolous," pursuant to PB § 60-2, which action denied Defendants a hearing (other than 5 minutes of oral argument on the motion) and shifted the burden of proof to the Defendants. In *Texaco, supra*, this Court held that "the burden of proof lies on the moving party to establish the frivolity of the appeal." Except for conclusory allegations, the Plaintiff has not offered a scintilla of evidence, cited any case or provided any legal analysis to show that the appeal is frivolous, nor did he rebut any of the law or facts cited in Defendants' Memorandum Of Law (App.223).

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES A SUBSTANTIAL FEDERAL QUESTION ON AN ISSUE OF SIGNIFICANCE, THAT IS, WHETHER THERE ARE LIMITS TO THE GOVERNMENT'S AUTHORITY TO TAKE PRIVATE PROPERTY FOR PRIVATE USE, AND, IF SO, HOW THOSE LIMITS SHOULD BE DEFINED AND ENFORCED.

This is not a case that concerns the use of the taking clause for a traditional public use such as a road or public building or for the purpose of urban renewal/blight removal such as the condemnations upheld in *Berman v. Parker*, 348 U.S. 26 (1954), and its progeny; nor does it concern the use of the taking clause to help a government increase its tax revenue and to create jobs currently under review by this Court in *Kelo v. City of New London*. It also is not a regulatory taking case where, after all, the laws and regulations are the product of majority voting in a democratic system. Rather, this case involves a taking with no public use or purpose a situation that at least some Justices of this Court implied during oral argument in *Kelo v.City of London* could never happen.[28] The constitutional question presented is whether:

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[28] During oral argument in the *Kelo v. City of New London* Justice Breyer said he could not imagine any taking that would not have a

state instrumentalities may take airspace above a person's residential shorefront land for the sole express purpose of improving the water view of a single neighboring private landowner. This is the broadest expansion of the taking clause yet realized. The case shows why there must be limits/guidelines within the broad taking powers of government. Without limits, lower courts will conduct limited, if any, constitutional analysis of the taking of property by state instrumentalities.

In *Schwartz v. Murphy*, the Connecticut Appellate Court, as affirmed by the Supreme Court of Connecticut, (i) found as fact that "in granting that subdivision application, the [City of Stamford] planning board, inter alia, imposed a condition that a triangular area in the [northeast] corner of what is presently the

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public benefit, so why does there have to be a limit within the broad eminent domain powers of government? At oral argument Justice Bryer specifically said:

> "..there is no taking for private use that you could imagine in reality that wouldn't also have a public benefit of some kind, whether it's increasing jobs or increasing taxes, et cetera. That's a fact of the world. And so given that fact of the world, that is law, why shouldn't the law say, okay, virtually every taking is all right, as long as there is some public benefit which there always is..." (emphasis added)

defendants' property be subject to a view easement." (App. 21); and (ii) agreed with and favorably cited the Trial Court's observation that "if the view easement is not for the benefit of the plaintiff's property [a private party], it is difficult to discern the identity of any other beneficiary."(App.24, fn 3).[29]

Even if the City of Stamford did impose the easement, which the Murphys contend it did not, and the approval of the subdivision was deemed adequate compensation paid, it would still be an unconstitutional taking of defendants' property because the taking was without a justifying public purpose. As the lower courts found, "it is difficult to discern the identity of any other beneficiary [of the easement other than the plaintiff, a private party]." (see fn 3 of Opinion at App. 24).

The need for this Court to specify limits/guidelines for the taking clause is demonstrated in this case. If the court below did

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[29] The Trial Court stated; "In granting this subdivision application, the Planning Board imposed a condition that a triangular area in the corner of what is now the defendants' property was subject to a view easement."(App.8) Note further that in the trial court's decision the word northeast does not even appear.(App.5). And there is absolutely no effort to make any distinction among conditions, restrictions and view easements.

not make the expressed finding that the only discernable beneficiary of the easement was the plaintiff, a private party, the Defendants would have an undue burden to demonstrate the unconstitutional taking of their property. After all, a number of courts, including the court below, have concluded that *Midkiff* dictates that, absent overwhelming evidence of bad faith or official corruption, all uses of taking must be affirmed. Justice Bryer's position (and to some extent the opinion held by the other Justices), expressed during oral argument in *Kelo v. City of New London*, is that "every taking is all right, as long as there is some public benefit which there always is..." As the case at bar demonstrates, the Connecticut courts do not even perform a constitutional analysis before affirming the taking of private property by a state instrumentality. Meaningful checks on the abuses of the taking clause and to provide guidance to government officials, property owners, and courts in reviewing the taking of private property for private use are needed.

II. THIS CASE PRESENTS THE COURT WITH A UNIQUE OPPORTUNITY TO EXAMINE ANOTHER FEDERAL CONSTITUTIONAL ISSUE OF IMPORTANCE: IF A STATE'S HIGHEST COURT AFFIRMS A PURELY PRIVATE TAKING, HOW IS THE TAKING VOIDED?

With the passage of the Fourteenth Amendment, the United States extended a baseline of protection of individuals' rights throughout the country. In *Hawaii Housing Auth. V. Midkiff*, 467 U.S. 229, 245 (1984) the this Court held that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." The Connecticut lower courts acknowledged that the taking in the instant case benefits no one except the plaintiff, a private party. Therefore, given that the defendants have no direct right of direct appeal to this Court, and the highest state court, the Supreme Court of Connecticut, affirmed the purely private taking, how do the Defendants have the purely private taking voided under *Midkiff?* Or is this a right with no remedy?

Our country has made great progress over the past years in guaranteeing civil rights, but we have failed to make the connection between civil rights and property rights. The former can only exist if the latter are secure. As this Court declared in *Lynch v. Household Finance Corp.* 405 U.S. 538 (1972): "Property does not have rights. People have rights. . . . In fact, a fundamental

interdependence exists between the personal right to liberty, and the personal right in property. Neither could have meaning without the other." John Adams said that "the moment that idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. Property must be sacred or liberty cannot exist." If only out of the concern for the plight of the defendants in the case at bar certiorari should be granted.

III. THIS CASE PRESENTS THE COURT WITH A RARE OPPORTUNITY TO DIRECTLY ADDRESS A CONSTITUTIONAL ISSUE OF SIGNIFICANCE, THAT IS: WHEN IS U.S. SUPREME COURT NO LONGER JUSTIFIED IN RELYING PRIMARILY ON A STATE'S STATE COURTS TO FULFILL ITS CONSTITUTIONAL ROLE AS PRIMARY GUARANTORS OF FEDERAL CONSTITUTIONAL RIGHTS?

Our judicial system depends on "good faith" decision-making. It was never intended to include intellectually dishonest decisions or "bad-faith" decision –making, where a judge knowingly and deliberating disregards the facts and law of the case. This case is not about innocent misstatement of facts, nor about peripheral facts. It not only involves the knowing and deliberate misrepresentation or omission of the material facts and

omission of law on which the case pivots, but also a judicial process where elementary legal principles, rules of evidence, standards of conduct simply ceased to exist.

The prevalence of intellectually dishonest decisions is described by Northwestern Law Professor Anthony D'Amato in "The Ultimate Injustice: When the Court Misstates the Facts" *Cardozo Law Review*, Vol. 11: 1313 (1990). He shows how judges at different levels of the state and federal systems manipulate the facts and the law to make a case turn out the way they want it to. It quotes from a speech by Hofstra Law Professor Monroe Freedman to The Seventh Annual Judicial Conference of the US Court of Appeals for the Federal Circuit (May 24, 1989), reprinted in 128 F.R.D. 409, 439 (1989):

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.

According to Professor Freedman immediately after his speech, a judge sitting next to him said, "You don't know the half of it."

Our nation is founded upon the ideals of individual rights, liberty and justice as reflected in the Constitution and the Declaration of Independence. The federal judiciary, in particular this Court, has then primary duty to safeguard these ideals. Yet blatant injustice and abuse of fundamental rights are all around us today, and the blame for its belongs squarely with the judiciary. Shock and disbelief is how novice litigants, including the Defendants, receive the reality of adjudication in our court system. The decent image of judges they once had gives way to one of dishonest, heartless careerists, who feign respect for the law in the few cases adjudicated in public view, yet walk all over litigants' rights in many cases that are handled backstage.[30]

This case presents the issue with a fully-developed record and legal decisions and is not muddied by procedural difficulties that could frustrate review.[31] Further, to no avail, the Defendants

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[30] A lawyer's ethical duty is to zealously represent each client, yet lawyers seldom raise misconduct issues. Lawyers have other clients whose cases may come before that judge. And it is not just their relationship with that judge that they want to protect, but with his judicial brethren, who are part of the judge's circle of friends and may be quite defensive of his honor, which they see as an extension of their own.

[31] If the omitted undisputed material facts and law set forth above,

tried to file a formal complaint with the Connecticut General Assembly regarding the unconstitutional conduct of the Connecticut Supreme Court and Appellate Court in this matter. [32]

The legal issue could not be more clearly presented to this Court: Whether there are limits to a court's authority to misstate or omit the material facts, omit material authorities, and issue rulings with no reasoning and, if so, how those limits should be defined and enforced?

CONCLUSION

For all the foregoing reasons, Petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted this 27th day of May, 2005.

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Stamford, Connecticut 06902
(203) 324-1423

Petitioners

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and at App.175-189, were clearly set forth and analyzed in the Trial Courts Memorandum (App.39), in all likelihood the opinion would be substantially different, and there would be no need for this Petition for Certification or the prior appeals.

[32] Each member of the Judiciary Committee received a copy of the e-mail reproduced in the Appendix at 288.

Supreme Court, U.S.
FILED

041614 MAY 27 2005

OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH SCHWARTZ

Respondent,

v.

KAREN A. MURPHY AND
KATHLEEN A. MURPHY

Petitioners.

On Petition for a writ of Certiorari to the Supreme Court of Connecticut

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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CV 00 0180296	: SUPERIOR COUNT
KENNETH A. SCHWARTZ	:JUDICIAL DISTRICT OF :STAMFORD/NORWALK
v.	:AT STAMFORD
KAREN A. MURPHY, ET AL	: AUGUST 30, 2001

MEMORANDUM OF DECISION

This Case, which was tried to the court, involves a view easement on Long Island Sound. The plaintiff, Kenneth A. Schwartz, owns property at 60 Saddle Rock Road, in the Shippan Point section of Stamford. The defendants, Karen A. Murphy and Katherine A. Murphy, live next door to the plaintiff at 68 Saddle Rock Road.

The plaintiff, who purchased his property in 1985, alleges that the defendants' property is subject to a view easement in his favor. According to the complaint, this easement arises from Map No. 12226, dated May 16, 1990, revised June 20, 1990, and entitled "Map Showing Adjustment of Property Lines Prepared for Spring Realty Corporation Stamford, Connecticut." This map, which was recorded in the Stamford land records on June 27, 1990, contains a notation indicating that: "No accessory structure or view

obstructions shall be placed in this area." The area in question is a small triangle, roughly 110 feet along its hypotenuse, 50 feet along another person's property, and 100 feet on the property line dividing the plaintiff's and the defendants' property.

The plaintiff alleges that the defendants have violated the easement because they permitted a hedge to grow over or above six feet in height and a large tree to remain in this triangular area. The plaintiff seeks a mandatory injunction requiring the defendants to keep their privet hedge trimmed to not more than six feet in height along the easement area, to remove the tree existing in the easement area, and to keep the easement area "free from blockage of any kind."

The defendants denied the material allegations of the complaint and filed a number of special defenses, including adverse use for over 15 years, abandonment, unclean hands, laches and a claim that the easement, if any exists, is "void for vagueness." The defendants also filed a counterclaim containing three counts. In the first count, the defendants seek "a judicial determination" of the existence and the scope of the alleged view easement. In the second count of the counterclaim, the defendants allege that they

and their predecessors in title used the area of the easement for over 15 years in an open, notorious and hostile manner, thus extinguishing the easement. In the third count, the defendants seek to quiet title to their property by obtaining a decree that their property is not subject to an easement.

The issues in this case are, first, does a view easement exist, second, if so, may the plaintiff enforce this easement or restriction, and, third, have the defendants violated the easement by reason of the hedges and tree. First, as to the existence of the easement, the defendants obtained title to their property from Charles McManus and Lynne McManus by a warranty deed dated May 13, 1999, and recorded May 14, 1999, in volume 5267 at page 221, which states that the property is conveyed subject to "Restriction as to view obstruction and location of accessory structures affecting the southeasterly corner of the premises as shown on said map, 12226." Map number 12226 contains the notation referred to in the plaintiff's complaint and the easement area is located on "Lot No. 3," which belongs to the defendants.

Moreover, the property now belonging to the defendants was also conveyed to them subject to "Restrictive covenants and agreements set forth in a certain agreement

between Faye Dunaway and John A. Contegni, et al, dated February 2, 1981 and recorded in Volume 2050 at Page 349." A predecessor in title to Faye Dunaway had received permission from the Planning Board of Stamford to subdivide her property consisting of 2.94 acres into several lots, one of which, lot #3, is now owned by the defendants. In granting this subdivision application, the Planning Board imposed a condition that a triangular area in the corner of what is now the defendants' property was subject to a view easement.

Several neighbors, including George P. Egbert and Judith B. Egbert, appealed this decision by the Planning Board to this court, but they ultimately withdrew their appeal after signing the above referred to agreement. The Egberts were the former owners of the plaintiff's property. Among other provisions, this so-called Dunaway-Contegni agreement stated that: "No dwelling, accessory structure or view obstruction shall be located in the triangular area 50' x 95' x 110' at the Southwesterly corner of said premises."[1] This agreement was recorded in the Stamford land records on June 26, 1981, in volume 2050 at page 349.

This same triangular area with the same restriction that is shown on Map no. 12224 is also depicted on a map numbered 10716 entitled "Showing subdivision of property prepared for Faye

[1] The word "southwesterly" is obviously a typographical error as the map shows that the view easement area is clearly at the easterly or southeasterly corner of the defendants' property, and toward the water.

Dunaway." This map was recorded on June 26, 1981. The defendants acquired their property from McManus . subject to the "Notations as shown on Maps Numbered 10716 and 12226." Thus, the source for the view easement in favor of the plaintiff's property as the dominant estate and over the defendants' property as the servient estate is the deed by which the defendants obtained title to their property, which contains certain conditions or restrictions, i.e., (1) the notations on Map # 12224; (2) the agreement between Dunaway and her neighbors, including the predecessor in title to the plaintiff; and (3) the notations on Map # 10716, In addition, as mentioned previously, the Planning Board, in approving the subdivision, which includes the defendants' Lot # 3, imposed the same restriction regarding view obstruction at the corner of the defendants' property. This finding of a view easement across the defendants' property also answers their request for a judgment declaring their rights viz-a-viz the plaintiff and to quiet title; General Statutes § 47-31; by extinguishing the view easement.

The next issue is whether the plaintiff may enforce the condition or restriction existing in the triangular area of Lot # 3. Our Supreme Court in Stamford v. Vuona, 108 Conn. 359, 364,

143 A. 245 (1928), refers to a class of restrictive covenants involving "mutual covenants in deeds exchanged between owners of adjoining lands" and indicates that "either party or his assigns may enforce the restriction because there is a mutuality of covenant and the rights are reciprocal." To the extent that this doctrine is deemed inapplicable because the deed to the plaintiff did not refer to the view easement, the plaintiff is still able to enforce this restriction or condition because both the defendants' predecessor in title, Dunaway, and the plaintiff's predecessor, Egbert, signed an agreement establishing this restriction on the defendants' use' of their property. Additionally, if the view easement is not for the benefit of the plaintiff's property, it is difficult to discern the identity of any other beneficiary. For these reasons, the contention by the defendants that the plaintiff has no right or standing to enforce the easement is not persuasive.

The remaining issue is whether the defendants are violating this view restriction. In Abington Limited Partnership v. Heublein, 246 Conn. 815, 831, 717 A.2d 1232 (1998), our Supreme Court quoted with approval the law of easements discussed in the Restatement (Third) of Property (Servitudes),

§ 4.10, which provides, among other things, that "the beneficiary of an easement . . . is entitled to make any use of the servient estate that is reasonably necessary for the convenient enjoyment of the servitude for its intended purpose."

The evidence indicated that along the boundary line between the properties of the plaintiff and of the defendants there is a privet hedge, which is located on the defendants' property. The plaintiff contends that if the defendants permit this hedge to grow more than six feet in height, his view of the Sound will be obstructed in violation of his easement. In addition, the plaintiff claims that the tree situated in the triangular easement area also obstructs his view of the water. Furthermore, the plaintiff complained of one or two shrub bushes which, if allowed to grow over six feet in height during the course of the summer, would obstruct his view easement.

The evidence further indicates that the hedge, which has been in existence a minimum of 22 years, is now about 15 feet in height for most of its length along the boundary line between the properties of the parties. Along the area of the view easement,

however, the hedge is approximately five or six feet high, because the plaintiff himself, without permission of the defendants, cut down this portion of the hedge. A picture of the scene, which was admitted in evidence as an exhibit, vividly illustrates that if the hedge is kept at six feet in height, the plaintiff can readily view the water, but if allowed to grow much higher, the hedge will inevitably impinge on the view easement.

As for the tree, the evidence indicates that it is a "Siberian elm" which has been in existence for a minimum of 40 years and well before this view easement was created. There is no sound reason for this tree to be cut down as sought by the plaintiff.[2] On the other hand, a view easement does exist over the defendants' property and if the tree is allowed to grow without any trimming it will adversely affect the dominant estate, that is, the plaintiff's view easement.

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[2] Such a drastic action would surely be contrary to the message in the well-known poem of (Joyce Kilmer, who wrote "I think that I shall never see a poem lovely as a tree," and concluded that "Poems are made by fools like me, but only God can make a tree."

Therefore, an injunction issues that the defendants shall keep their hedge, and any other bushes in the area of the view easement, to a height of not more than six feet, and shall also keep the tree trimmed and pruned so that it is reasonably similar in shape and height to the way it existed in September of 2000, when this lawsuit began. The defendants failed to prove any of the allegations of their counterclaim and hence judgment enters in favor of the plaintiff with respect to the counterclaim. No costs shall be taxed to either party.

So Ordered.

Dated at Stamford, Connecticut, this 30th day of August, 2001.

s/Willaim B. Lewis

William B. Lewis, Judge (TR)

APPELLATE COURT

STATE OF CONNECTICUT

AC 22318

KENNETH A. SCHWARTZ

V.

KAREN A. MURPHY ET AL.

January 24, 2002

ORDER

THE MOTION OF THE DEFENDANTS-APPELLANTS,, FILED DECEMBER 20, 2001, FOR REVIEW OF PHOTODUPLICATED RECORD, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **O R D E R E D THAT THE MOTION IS GRANTED BUT THE RELIEF SOUGHT THEREIN IS DENIED. (PLEASE NOTE: THE ENTIRE TRIAL COURT FILE IS AVAILABLE TO THE APPELLATE COURT. SEE PRACTICE BOOK §68-1)**

BY THE COURT,
s/Alan M. Gamnuscio
ASSISTANT CLERK-APPELLATE

NOTICE SENT: JANUARY 24, 2002
RYAN, RYAN, JOHNSON & DELUCA, LLP
KAREN A. MURPHY, PRO SE
KATHLEEN A. MURPHY, PRO SE

er 592/2649

KENNETH A. SCHWARTZ *v.* KAREN A. MURPHY ET AL.
(AC 22318)
Lavery, C. J., and Foti and Dranginis, Js.
Argued September 12—officially released December 24, 2002
(Appeal from Superior Court, judicial district of Stamford-Norwalk, Lewis, J.)
Karen A. Murphy, pro se, and *Kathleen A. Murphy*, pro se, the appellants (defendants).
J. Paul Johnson, with whom was *John B. Gaffney*, for the appellee (plaintiff).

Opinion

LAVERY, C. J. The defendants, Karen A. Murphy and Kathleen A. Murphy, appeal from the judgment of the trial court, rendered after a trial to the court, determining that a view easement exists over a portion of their property in favor of the plaintiff, Kenneth A. Schwartz, and granting a mandatory injunction ordering the defendants to maintain that easement in accordance with the court's specifications. The principal issues on appeal are whether the court properly (1) determined that a view easement exists over the defendants' property for the benefit of the plaintiff's property and (2) granted a mandatory injunction ordering the defendants to maintain the view easement.[1] We affirm, in part, and reverse, in part, the judgment of the trial court.

The record reveals the following facts that are relevant to the defendants' appeal. The parties are the owners of adjoining parcels of land in the Shippan Point area of Stamford. The plaintiff obtained title to his property, at 60 Saddle Rock Road, from Marsi T. Hope by a warranty deed that was recorded in the land records on August 28, 1985. The defendants obtained title to their property, at 68 Saddle Rock Road, from Charles McManus and Lynne McManus by a warranty deed that was recorded in the land records on May 14, 1999.

The defendants' deed indicates that their property is subject to, inter alia, the following restrictions: (1)

"Restriction as to view obstruction and location of accessory structures affecting the southeasterly corner of the premises as shown on said map, 12226," (2) "Notations as shown on Maps numbered 10716 and 12226" and (3) "Restrictive covenants and agreements set forth in a certain agreement between Faye Dunaway and John A. Contegni, et al., dated February 2, 1981 . . . ."

On September 15, 2000, the plaintiff commenced the present action against the defendants, alleging that the defendants' property is subject to a view easement in his favor, "as shown on Map No. 12226 . . . ." He further alleged that the defendants have permitted a privet hedge and a large tree to remain in the easement area, thereby obstructing his view of Long Island Sound in violation of the view easement. As a remedy, the plaintiff sought a mandatory injunction requiring the defendants to maintain "their privet hedge trimmed to not more than six feet in height along the easement area to remove the tree existing in the easement area and to keep the easement free from blockage of any kind."

The defendants denied the plaintiff's material allegations and raised a number of special defenses, including adverse use, abandonment, unclean hands, laches and a claim that the easement is void for vagueness. The defendants also filed a counterclaim to determine the respective rights of the parties with respect to the view easement and to quiet title.

After a trial, the court issued a memorandum of decision on August 30, 2001. In its memorandum of decision, the court found that a view easement exists over the defendants' property, the plaintiff may enforce the view easement, and the defendants are violating the view easement by permitting their hedge and tree to grow to a height that impinges on the plaintiff's view of Long Island Sound. The court granted a mandatory injunction in favor of the plaintiff, ordering the defendants to maintain

the view easement in accordance with the court's specifications.[2] The court also rendered judgment in favor of the plaintiff on the defendants' counterclaim. This appeal followed. Additional facts will be set forth as necessary.

I

We first consider whether the court properly determined that a view easement exists over the defendants' property for the benefit of the plaintiff's property. We conclude that it did.

In its memorandum of decision, the court concluded that "the source for the view easement in favor of the plaintiff's property as the dominant estate . . . over the defendants' property as the servient estate is the deed by which the defendants obtained title to their property, which contains certain conditions or restrictions . . . ." The court further concluded that although the plaintiff's deed did not refer to the view easement, "the plaintiff is still able to enforce this restriction or condition because both the defendants' predecessor in title, Dunaway, and the plaintiff's predecessor, [George P. Egbert and Judith B.] Egbert, signed an agreement establishing this restriction on the defendants' use of their property."[3] We agree with the court.

A servitude is created if the owner of the property to be burdened enters into a contract or makes a conveyance intended to create a servitude. See 1 Restatement (Third), Property, Servitudes § 2.1, p. 51 (2000). "[T]he determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary. . . . Thus, when faced with a question regarding the construction of language in deeds, the reviewing court does not give the customary deference to the trial court's factual inferences. . . .

"The principles governing the construction of instruments

of conveyance are well established. In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed . . . and that it shall, if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . . In addition, when a deed sets forth two different descriptions of the property to be conveyed, the one containing the less certainty must yield to that possessing the greater, if apparent conflict between the two cannot be reconciled. . . .

"In the construction of a deed or grant, the language is to be construed in connection with, and in reference to, the nature and condition of the subject matter of the grant at the time the instrument is executed, and the *obvious purpose* the parties had in view. . . . [I]f the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Mulla* v. *Maguire*, 65 Conn. App. 525, 531–32, 783 A.2d 93, cert. denied, 258 Conn. 934, 785 A.2d 229 (2001).

Furthermore, "[a] reference to [a] map in [a] deed, [f]or a more particular description, incorporates [the map] into the deed as fully and effectually as if copied therein. *Bankers Trust Co.* v. *Zoning Board of Appeals*, 165 Conn. 624, 631, 345 A.2d 544 (1974). [T]he identifying or explanatory features contained in maps referred to in a deed become part of the deed, and so are entitled to consideration in interpreting the deed as

though they were expressly recited therein." (Internal quotation marks omitted.) *Bolan* v. *Avalon Farms Property Owners Assn., Inc.*, 250 Conn. 135, 141–42, 735 A.2d 798 (1999); see also General Statutes § 7-31.[4]

In the present case, the defendants' deed indicates that their property was conveyed subject to a "Restriction as to view obstruction and location of accessory structures affecting the *southeasterly* corner of the premises *as shown on said map, 12226*." (Emphasis added.) Map no. 12226, entitled "Map Showing Adjustment of Property Lines Prepared for Spring Realty Corporation," contains the following notation: "No accessory structures or view obstructions shall be placed in this area." That notation refers to a 50 foot by 100 foot by 110 foot triangular area located in the *northeasterly* corner of "Lot No. 3," which is now the defendants' property. Map no. 12226 was recorded in the land records on June 27, 1990.

The defendants' deed also indicates that the property was conveyed subject to "Notations as shown on Maps Numbered 10716 and 12226." Map no. 10716, entitled "Map Showing Subdivision Of Property Prepared For Faye Dunaway," contains the same notation as that on map no. 12226, concerning the view easement, and it also locates the easement in the *northeasterly* corner of the defendants' property. Map no. 10716 was recorded in the land records on June 26, 1981.

There is no question that the restrictions in the defendants' deed express the intent to establish a view easement over the defendants' property. There is a discrepancy, however, between the text of the restrictive covenant in the deed and the survey maps incorporated into the deed with respect to the exact location of the easement on the defendants' property. To clarify that ambiguity, we consider the circumstances surrounding the conveyance, including any extrinsic evidence bearing on the issue. See *Mulla* v. *Maguire*, supra,

65 Conn. App. 535; see also *Castonguay* v. *Plourde*, 46 Conn. App. 251, 263, 699 A.2d 226 (''terms of a covenant . . . cannot be construed in a vacuum, but are to be understood in context''), cert. denied, 243 Conn. 931, 701 A.2d 660 (1997).

First, we note that although the text of the restrictive covenant describes the view easement as ''affecting the southeasterly corner'' of the defendants' property, it further states that the easement is shown on map no. 12226. According to the rules of construction previously outlined, the general description in the text of the deed must yield to the more specific description in the survey map incorporated into the deed by explicit reference thereto. See, e.g., *Mulla* v. *Maguire*, supra, 65 Conn. App. 535.

Also, although map nos. 10716 and 12226 both contain handwritten markings that indicate which direction is north, those markings are not easily discerned and, without that directional guidance, the view easement at issue appears to be located in the *southeasterly* corner of the defendants' property because of the directional orientation of the maps. The reference to ''southeasterly'' in the text of the deed, therefore, likely is attributable to the failure of the parties to discern the correct directional orientation of the maps. Indeed, it appears that the court also made that mistake. Accordingly, we conclude that the correct location of the view easement on the defendants' property is depicted on map nos. 10716 and 12226, i.e., the triangular area that abuts the portion of the plaintiff's property that is adjacent to Long Island Sound.

The defendants' deed further indicates that the property was conveyed subject to ''Restrictive covenants and agreements set forth in a certain agreement between Faye Dunaway and John A. Contegni, et al., dated February 2, 1981 . . . .'' On June 14, 1978, the Deleo Brothers Development Corporation (Deleo

Brothers) received permission from the Stamford planning board to subdivide its Saddle Rock Road property consisting of 2.94 acres into several lots. In granting that subdivision application, the planning board, inter alia, imposed a condition that a triangular area in the corner of what is presently the defendants' property be subject to a view easement. Several neighboring property owners, including the former owners of the plaintiff's property, the Egberts, appealed to the court from the planning board's decision to grant the subdivision application. In the meantime, Deleo Brothers conveyed the property at issue to Faye Dunaway.

On February 2, 1981, Dunaway and the neighboring property owners came to an agreement, resolving their differences with respect to the planned subdivision.[5] Specifically, the parties agreed that Dunaway's property would not be subdivided into more than three lots and the subdivision would be subject to certain restrictive covenants. One of those restrictive covenants states: "No dwelling, accessory structure or view obstruction shall be located in the triangular area 50' x 95' x 110' at the *southwesterly* corner of said premises."[6] (Emphasis added.) The Dunaway-Contegni agreement further provides in relevant part: "The intent of these restrictive covenants and agreements is to protect property values. The parties hereto, their successors and assigns and heirs, shall all have the right to enforce the terms of this agreement in case of its violation by such court action that may be appropriate, including but not limited to, application for injunctive relief."

In light of the explicit reference to the Dunaway-Contegni agreement in the defendants' deed, to which the plaintiff's predecessor in title was a party, we conclude that the plaintiff is entitled to enforce the view easement. Accordingly, our plenary review of the court's construction of the defendants' deed and examination of the surrounding circumstances to the conveyance convinces us that the court properly determined

that a view easement exists over a portion of the defendants' property for the benefit of the plaintiff's property as shown on map nos. 10716 and 12226.

II

We next consider whether the court properly granted a mandatory injunction ordering the defendants to maintain the view easement. We conclude that it did not.

The following additional facts are relevant to our resolution of the defendants' claim. On the defendants' property, there is a privet hedge that runs along the boundary line between the plaintiff's and the defendants' properties. The hedge has existed there for at least twenty-two years. It is about fifteen feet high for most of its length; however, along the view easement area it is about six feet high because the plaintiff has been pruning it to that height. There also is a "Siberian elm" tree growing in the view easement area. That tree has existed there for at least forty years.

In its memorandum of decision, the court found that if the hedge is permitted to grow much higher, it "will inevitably impinge on the view easement." The court also found that if the tree is permitted to grow "without any trimming, it will adversely affect . . . the plaintiff's view easement." On the basis of those findings, the court issued an injunction ordering the defendants to maintain the view easement in accordance with the court's specifications. Specifically, the court ordered the defendants to "keep their hedge, and any other bushes in the area of the view easement, to a height of not more than six feet," and to "keep the tree trimmed and pruned so that it is reasonably similar in shape and height to the way it existed in September of 2000 . . . ."

An "[i]njunction is the proper remedy to stop interference with an owner's use and enjoyment of an easement." (Internal quotation marks omitted.) *DiSorbo* v. *Grand Associates One Ltd. Partnership*, 8 Conn. App. 203, 208 n.4, 512 A.2d 940 (1986). "[T]he holder of an

easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. . . . [T]he holder [however] is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.'' 1 Restatement (Third), supra, § 4.10, p. 592; see also *Gager* v. *Carlson*, 146 Conn. 288, 292–94, 150 A.2d 302 (1959).

''The law is settled that the obligation of the owner of the servient estate, as regards an easement, is not to maintain it, but to refrain from doing or suffering something to be done which results in an impairment of it.'' (Internal quotation marks omitted.) Kelly v. Ivler, 187 Conn. 31, 45, 450 A.2d 817 (1982); see also 1 Restatement (Third), supra, § 4.13, p. 631.[7] ''The duty of maintaining an easement so that it can perform its intended function [therefore] rests on the owner of the easement absent any contrary agreement.'' Powers v. Grenier Construction, Inc., 10 Conn. App. 556, 560, 524 A.2d 667 (1987); see also 1 Restatement (Third), supra, § 4.13, p. 631.

In the present case, the defendants, by the express terms of the restrictive covenant in their deed, are prohibited from placing accessory structures or view obstructions in the easement area. It is undisputed that the hedge and tree existed in the easement area prior to the creation of the view easement. The defendants, therefore, have not violated the terms of the restrictive covenant by allowing the hedge and tree to continue to grow in the easement area. Furthermore, the defendants' deed contains no language concerning, nor is there evidence of, any other agreement that requires the defendants to maintain the view easement for the plaintiff. Under such circumstances, the law is clear that it is the plaintiff's responsibility to maintain the view easement at his expense, and he had no right to compel the defendants to maintain it for his benefit.[8] See *Powers* v. *Grenier Construction, Inc.*, supra, 10

Conn. App. 560; *Labbadia* v. *Bailey*, 147 Conn. 82, 89, 157 A.2d 237 (1959); 1 Restatement (Third), supra, § 4.13, p. 631.

We conclude that the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement.
The judgment is reversed insofar as it grants a mandatory injunction in favor of the plaintiff and the case is remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion. In all other respects the judgment is affirmed.

In this opinion the other judges concurred.

[1] The defendants also claim that the court improperly (1) admitted certain evidence in violation of their due process rights, (2) permitted the plaintiff to amend his complaint, (3) effected a deed reformation, (4) ignored the statute of limitations set forth in General Statutes § 52-575a and the doctrine of adverse possession, and (5) excluded certain evidence. On the basis of our review of the record, we conclude that those claims are entirely without merit.

[2] The injunction stated that "the defendants shall keep their hedge and any other bushes in the area of the view easement to a height of not more than six feet, and shall also keep the tree trimmed and pruned so that it is reasonably similar in shape and height to the way it existed in September of 2000, when this lawsuit began."

[3] The court also noted that "if the view easement is not for the benefit of the plaintiff's property, it is difficult to discern the identity of any other beneficiary."

[4] General Statutes § 7-31 provides in relevant part: "When any person having an interest in land has caused it to be surveyed and plotted or laid out into lots and projected highways, and a map made, which map shall bear the seal of the surveyor and a certification that it is substantially correct to the degree of accuracy shown thereon, and when such projected highways have been approved by the municipal authorities empowered to approve

the layout of highways, the map may be received and placed on file in the office of the clerk of the town in which such land is situated and shall thereupon be deemed a part of the deeds referring thereto . . . .'' (Emphasis added.)

[5] The Dunaway-Contegni agreement was recorded in the land records on June 26, 1981. Thereafter, the neighboring property owners withdrew their appeal, and Dunaway's property was subdivided into three lots, which she conveyed to Spring Realty Corporation. In 1991, Spring Realty conveyed lot no. 3 to the McManuses, who, as previously noted, conveyed it to the defendants in 1999.

[6] The court found that the reference to the ''southwesterly'' corner in the Dunaway-Contegni agreement was ''obviously a typographical error, as the map shows that the view easement area is clearly at the easterly or southeasterly corner of the defendants' property and *toward the water*.'' (Emphasis added.) We agree with the court that the reference to the ''southwesterly'' corner is a scrivener's error and that the correct location of the easement, as previously discussed, is depicted on map no. 10716. We also note that, significantly, map no. 10716 is entitled ''Map Showing Subdivision Of Property Prepared For Faye Dunaway.''

[7] 1 Restatement (Third), supra, § 4.13, p. 631, provides in relevant part: ''Unless the terms of a servitude . . . provide otherwise, duties to repair and maintain the servient estate . . . are as follows:

''(1) The beneficiary of an easement . . . has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate . . . that are under the beneficiary's control, to the extent necessary to ''(a) prevent unreasonable interference with the enjoyment of the servient estate, or ''(b) avoid liability of the servient-estate owner to third parties.

''(2) Except as required by § 4.9, the holder of the servient estate has no duty to the beneficiary of an easement . . . to repair or maintain the servient estate . . . .''

1 Restatement (Third), supra, § 4.9, p. 581, provides in relevant part: ''Except as limited by the terms of the servitude . . . the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.''

[8] Although the plaintiff is entitled to maintain the view easement in a manner that is reasonably necessary for his enjoyment of it, he must do so without causing unreasonable harm to the existing hedge and tree. See 1 Restatement (Third), supra, § 4.10, p. 592; see also Gager v. Carlson, supra, 146 Conn. 292–94. We agree with the court that it is not necessary to remove or to excessively trim and to prune the hedge and tree for the plaintiff to conveniently enjoy the view easement. We also agree with the court's finding that if the hedge and other bushes in the view easement area are kept at a height of six feet and the tree is trimmed so that it is kept at approximately the same shape and height as it is shown in exhibits twelve and thirteen, which are photographs of the property, there is no impingement on the plaintiff's view of Long Island Sound.

SCHWARTZ, KENNETH VS.

MURPHY,KAREN CV-00-0180296-S(IHR)

IN ACCORDANCE WITH THE APPELLATE COURT'S RULING, THE FOLLOWING ORDER WILL BE SIGNED ON AUGUST 1, 2003 BARRING ANY OBJECTION THERETO. ANY OBJECTION TO THE ORDER MUST BE RECEIVED IN WRITING ON OR BEFORE JULY 31, 2003 AND MUST BE DIRECTED TO THE ATTENTION OF JULIE PINTO-DWORKIN, ASSISTANT CLERK.
NOW THEREFORE, IT WILL BE ORDERED AS FOLLOWS: 1. THAT THE MANDATORY INJUNCTION IS HEREBY DISSOLVED. 2. THAT THE OWNER OF THE DOMINANT ESTATE (THE PLAINTIFF'S PROPERTY) SHALL HAVE THE RIGHT TO MAINTAIN THE VIEW EASEMENT OVER THE SERVIENT ESTATE (THE DEFENDANT'S PROPERTY) AT THE SOLE COST AND EXPENSE OF THE OWNER OF THE DOMINANT ESTATE IN ACCORDANCE WITH THIS ORDER.

KAREN MURPHY
350 BEDFORD ST
SUITE 404
STAMFORD, CT 06901

SUPERIOR COURT
123 HOYT STREET
STANFORD, CT 06905

DATED: JUL 14, 2003
FST

SCHWARTZ,KENNETH VS.
MURPHY,KAREN CV-00-0180296-S(IHR)

3. THAT THE RIGHT TO MAINTAIN THE EASEMENT SHALL BE CARRIED OUT IN A MANNER THAT IS REASONABLY NECESSARY TO PERMIT THE ENJOYMENT OF THE VIEW EASEMENT AND WHICH WILL NOT UNREASONABLY HARM THE EXISTING HEDGE AND TREE. 4. THAT THE RIGHT SHALL INCLUDE THE RIGHT TO TRIM THE HEDGE AND OTHER BUSHES IN THE VIEW EASEMENT SO THAT THE HEDGE IS KEPT AT A HEIGHT OF APPROXIMATELY SIX (6) FEET AND TO TRIM THE SIBERIAN ELM TREE LOCATED IN THE VIEW EASEMENT SO THAT IT IS KEPT AT APPROXIMATELY THE SAME SHAPE AND HEIGHT AS IT WAS AT THE TIME OF THIS COURT'S 8/30/01 DECISION. 5. THAT THE OWNER OF THE DOMINANT ESTATE OR HIS AGENTS MAY ENTER ONTO THE SERVIENT ESTATE FOR THE SOLE

KAREN MURPHY
350 BEDFORD ST
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FST

SCHWARTZ,KENNETH VS.
MURPHY,KAREN CV-00-0180296-S(IHR)

PURPOSE OF CARRYING OUT THE WORK
DESCRIBED ABOVE.

(LEWIS, J.)
JULIE PINTO-DWORKIN
ASSISTANT CLERK
7/14/03

KAREN MURPHY
350 BEDFORD ST
SUITE 404
STAMFORD,CT 06901

SUPERIOR COURT
123 HOYT STREET
STAMFORD, CT 06905

DATED: JUL 14, 2003
FST

CV 00 0180296	: SUPERIOR COURT
KENNETH A. SCHWARTZ	: JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	: AT STAMFORD
KAREN A. MURPHY, ET AL.	: OCTOBER 9, 2003

MEMORANDUM OF DECISION

On December 24, 2002, the Appellate Court rendered a decision with respect to an appeal by the defendants in this case, Karen A. Murphy and Kathleen A. Murphy, Schwartz v. Murphy, 74 Conn. App. 286, 812 A.2d 87 (2002). The Appellate Court ruled that the plaintiff, Kenneth A. Schwartz, was entitled to a view easement over a portion of the defendants' property located on Saddle Rock Road in Stamford. The court further ordered that maintenance of this view easement was to be at the sole expense of the plaintiff, as the holder of the dominant estate.

The defendants' petition for certification was denied by our Supreme Court on April 3, 2003 in Schwartz v. Murphy. 263 Conn. 908, 819 A.2d 841(2003).

This court had issued a mandatory injunction directing the defendants to maintain the plaintiff's easement and the remand by the Appellate Court directed that the injunction be dissolved and also that the "respective rights and obligations of the parties with respect to the

maintenance of the view easement" be determined. The Appellate Court's ruling is very clear and explicit that the plaintiff has a view easement over the defendants' property, but that he is obliged to maintain the hedge and the tree at his own cost and expense. In a footnote on page 298, the Appellate Court added that: "Although the plaintiff is entitled to maintain the view easement in a manner that is reasonably necessary for the enjoyment of it, he must do so without causing unreasonable harm to the existing hedge and tree... . We agree with the court that it is not necessary to remove or to excessively trim and to prune the hedge and tree for the plaintiff to conveniently enjoy the view easement. We also agree with the court's finding that if the hedge and other bushes in the view easement area are kept at a height of six feet and the tree is trimmed so that it is kept at approximately the same shape and height as it is shown in exhibits twelve and thirteen, which are photographs of the property, there is no impingement on the plaintiff's view of Long Island Sound." Schwartz v. Murphy, supra, 74 Conn. App. 298, n.8.

In terms of the dimensions of the view easement over the defendants' property, the Appellate Court referred to Map no. 12226 of the Stamford land records, which map contained a notation that the easement: "refers to a 50 foot by 100 foot by 110 triangular area located in the northeasterly corner of . . . the defendants' property." Id., 298. The Appellate Court also noted that there was some confusion about the

location of the easement on either the northwesterly corner of the defendants' property or the northeasterly corner, but the Appellate Court concluded that: "the correct location of the view easement on the defendants' property is depicted on map nos. 10716 and 12226, i.e., the triangular area that abuts the portion of the plaintiff's property that is adjacent to Long Island Sound." Id., 293-94. The Appellate Court also noted. that: "We agree with the court that the reference to the 'southwesterly' corner is a scrivener's error and that the correct location of the easement, as previously discussed, is depicted on map no. 10716." Id., 295, n.6. In any event, it is obvious that the easement is for the benefit of the plaintiff to aid his view from his house and property of the waters of Long Island Sound and that in turn requires that the triangular piece of the defendants' property that could impact adversely on that view is subject to the view easement.

The plaintiff thereafter submitted a draft judgment file, to which the defendants have objected. The first reason offered by the defendants is that the entry of judgment is "premature" because, before judgment may be entered, this court should first issue a memorandum of decision regarding the "respective rights and obligations of the parties with respect to the maintenance of the view easement." This memorandum of decision discusses this very issue and the entry of judgment at this time is not premature. The plaintiff, according to the Appellate Court, has a view

easement over the defendants' property, but is obliged to maintain said easement at his own cost and expense without unreasonable harm to the hedge and tree. This means the plaintiff may enter upon the defendants' property at reasonable times in order to maintain his easement, but for no other purpose.

The defendants also claim that this case should be reopened "to admit newly discovered relevant extrinsic evidence." Alternatively, the defendants request that a "new trial" be held to analyze this alleged newly discovered evidence that the view easement applies to some other person's property, but not to their property, and that the Planning Board of the city of Stamford did not impose a view easement over the defendants' property.

This court declines to either reopen this matter or to grant a "new trial," as requested by the defendants, because all issues were fully litigated and this case is closed. This court held a trial, rendered a decision, which was accepted by the Appellate Court, except for a change to reflect that the plaintiff himself is solely responsible for the costs of trimming the hedge and the elm tree. A motion to the Appellate Court for "reconsideration" was denied, as was a request to our Supreme Court for certification. The only thing remaining for this court is the entry of judgment. The plaintiff's proposed judgment corresponds with and conforms to the decision of the Appellate. Court. Thus, the draft

judgment submitted by the plaintiff is accepted as the judgment in this case.

So Ordered.

Dated at Stamford, Connecticut, this 9th day of October, 2003.

s/William B. Lewis
William B. Lewis, Judge (TR)

STATE OF CONNECTICUT

NO: CV 00 0180296 S **SUPERIOR COURT**

KENNETH A. SCHWARTZ
60 Saddle Rock Road
Stamford, CT 06902

JUDICIAL DISTRICT OF STAMFORD/NORWALK

VS.

AT STAMFORD

KAREN A. MURPHY
68 Saddle Rock Road
Stamford, CT 06902

KATHLEEN A. MURPHY
68 Saddle Rock Road
Stamford, CT 06902

OCTOBER 9, 2003

Present: **The Hon. William B. Lewis, Judge (T.R.)**

JUDGMENT FILE

This action, by writ and complaint, seeking a permanent injunction, came to this court on October 17, 2000 and thence to March 1, 2001 when the parties appeared and were at issue to the court as on file.

The court, having heard the parties, found the issues for the plaintiff in a Memorandum of Decision dated August 30, 2001, and an injunction was issued that the defendants shall keep their hedge, and any other bushes in the area of the view easement, to a height of not more than six feet, and shall also keep the tree trimmed and pruned so that it is reasonably similar in shape and height to the way it existed in September of 2000, when this lawsuit began.

The action came thence to September 14, 2001 when the defendants filed an appeal. On December 24, 2002, as reported in 74 Conn. App. 286, 812 A.2d 87 (2002), the Appellate Court reversed the judgment insofar as it grants a mandatory injunction in favor of the plaintiff and remanded the case with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with the Appellate Court's opinion.

The action came thence to January 3, 2003, when the defendants filed a Motion for Reconsideration of the Appellate Court Decision. The Appellate Court found the motion should be and the same was denied on February 20, 2003.

The action came thence to March 10, 2003, when the defendants filed a petition for Certification to Appeal. The Supreme Court found the motion should be and the same was denied on April 3, 2003.

Wherefore it is adjudged that:

(1) The mandatory injunction relating to maintenance of the view easement is vacated and dissolved.

(2) The plaintiff, as owner of the dominant estate, has the right to maintain the view easement over the defendants' property at his sole cost and expense. (3) The plaintiff's right to maintain the easement shall be performed in a manner that is reasonably necessary to permit the enjoyment of the view easement and which will not reasonably harm the existing hedge and elm tree.

(4) The plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet and to trim the elm tree so that it is maintained at approximately the same shape and height as shown in exhibits 12 and 13 submitted at the trial before this court.

(5) The plaintiff and his agents have the right to enter upon the defendants' property for the sole purpose of performing the trimming of the hedge, bushes and tree as described above, and only at reasonable times and not on weekends.

s/William B. Lewis
WILLIAM B. LEWIS, JUDGE (TR)

AC 24754
CV 00 0180296 : SUPERIOR COURT

KENNETH A. SCHWARTZ

: JUDICIAL DISTRICT OF
: STAMFORD/NORWALK

V. : AT STAMFORD

KAREN A. MURPHY, ET AL. : MAY 27 2004

MEMORANDUM RE: ARTICULATION/TERMINATION

On December 24, 2002, the Appellate Court rendered a decision with respect to an appeal by the defendants in this case, Karen A. Murphy and Kathleen A. Murphy, Schwartz v. Murphy, 74 Conn. App. 286, 812 A.2d 87 (2002). The Appellate Court ruled that the plaintiff, Kenneth A. Schwartz, was entitled to a view easement over a portion of the defendants' property located on Saddle Rock Road in Stamford. The court further ordered that maintenance of this view easement was to be at the sole expense of the plaintiff, as the holder of the dominant estate.

The defendants' petition for certification was denied by our Supreme Court on April 3, 2003 in Schwartz v. Murphy, 263 Conn. 908, 819 A.2d 841(2003). This court then prepared a judgment file after giving notice to the parties and

offering an opportunity to comment thereon. The judgment file was based on the Appellate Court's ruling, which was very clear and explicit, stating that the plaintiff has a view easement over the defendants' property, and that the plaintiff is obliged to maintain the hedge and the tree at his own cost and expense.

This court denies the defendants' motion for articulation or rectification of its memorandum of decision dated October 9, 2003, because all the issues in this controversy about a view easement were fully litigated and this case is over and finished. The defendants do not appear to understand this. This court held a trial and rendered a written decision, which was affirmed by the Appellate Court, except for a change to reflect ~~that~~ the plaintiff himself is solely responsible for the costs of trimming the hedge and the elm tree. A motion by the defendants to the Appellate Court for "reconsideration" was denied, as was a request to our Supreme Court for certification. The only thing that remained for this court was the entry of judgment. The judgment that entered corresponded with and conformed to the decision of the Appellate Court in every detail.

Moreover, the memorandum of decision dated October 9, 2003 that accompanied the judgment file was filed merely to explain the background of the judgment of the same date. It was not necessary that a memorandum of decision be filed be filed in the first place, and articulation/ rectification thereof is not warranted in any event. The only purpose of the memorandum was to set forth the history behind the judgment.

The defendants appealed the entry of judgment and the plaintiff has now moved to terminate the automatic stay. That motion is granted on the authority of Practice Book § 61-11 (c), which provides that the automatic stay on appeal may be terminated if the judge who tried the case is of the belief that (1) the appeal is taken "only for delay or (2) the due administration of justice requires."

This appeal, in the court's opinion, was taken by the defendants solely for the purpose of delaying the plaintiff from exercising the right to a view easement which has been granted by the Appellate and Supreme Court decisions. There is nothing to appeal at this point because the judgment simply carried out in detail the decision of the Appellate Court. The defendants would

like a new trial because they did not like the results of the first trial, but they are not entitled to a second trial. Their appeal is without merit. "The due administration of justice" requires an end to the defendants' attempt to obtain a new trial. They have had their day in court.

Hence, the plaintiff's motion to terminate the stay on appeal is granted.

Dated at Stamford, Connecticut, this 27TH Day of May, 2004.

s/William B. Lewis
William B. Lewis, Judge (TR)

APPELLATE COURT

STATE OF CONNECTICUT

AC 24754
KENNETH A. SCHWARTZ

V.

KAREN A. MURPHY ET AL.

JULY 13, 2004

ORDER

THE MOTION OF THE DEFENDANTS, FILED JUNE 7, 2004, FOR REVIEW OF THE SUPERIOR COURT'S MEMORANDUM RE: ARTICULATION/TERMINATION, PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D THE MOTION FOR REVIEW IS GRANTED BUT THE RELIEF REQUESTED THEREIN IS DENIED.

BY THE COURT,

s/Paul Hartan
ASSISTANT CLERK-APPELLATE

NOTICE SENT: JULY 14, 2004
RYAN, RYAN, JOHNSON & DELUCA, LLP
KAREN A. MURPHY, PRO SE
KATHLEEN A. MURPHY, PRO SE
HON. WILLIAM B. LEWIS
CLERK, J.D. OF STAMFORD-NORWALK
(CV00-0180296S)

APPELLATE COURT

STATE OF CONNECTICUT

AC 24754
KENNETH A. SCHWARTZ

V.

KAREN A. MURPHY ET AL.

JULY 13, 2004

ORDER

THE MOTION OF THE DEFENDANTS, FILED JUNE 7, 2004, FOR REVIEW OF THE SUPERIOR COURT'S DECISION TO GRANT PLAINTIFF'S MOTION TO TERMINATE STAY, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **O R D E R E D** THE MOTION FOR REVIEW IS GRANTED BUT THE RELIEF REQUESTED THEREIN IS DENIED.

BY THE COURT,

s/Paul Hartan
ASSISTANT CLERK-APPELLATE

NOTICE SENT: JULY 14, 2004
RYAN, RYAN, JOHNSON & DELUCA, LLP
KAREN A. MURPHY, PRO SE
KATHLEEN A. MURPHY, PRO SE
HON. WILLIAM B. LEWIS
CLERK, J.D. OF STAMFORD-NORWALK
(CV00-0180296S)

er 1135

APPELLATE COURT

STATE OF CONNECTICUT

AC 24754

KENNETH A. SCHWARTZ

V.

KAREN A. MURPHY ET AL.

JULY 13, 2004

ORDER

THE MOTION OF THE PLAINTIFF-APPELLEE, FILED JUNE 14, 2004, TO DISMISS DEFENDANT'S MOTION FOR REVIEW, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **O R D E R E D** DISMISSED.

BY THE COURT,
s/Paul Hartan
ASSISTANT CLERK-APPELLATE

NOTICE SENT: JULY 14, 2004
RYAN, RYAN, JOHNSON & DELUCA, LLP
KAREN A. MURPHY, PRO SE
KATHLEEN A. MURPHY, PRO SE

er 1162

APPELLATE COURT

STATE OF CONNECTICUT

AC 24754

KENNETH A. SCHWARTZ
V.
KAREN A. MURPHY ET AL.

JULY 13, 2004

ORDER

THE MOTION OF THE PLAINTIFF-APPELLEE, FILED JUNE 14, 2004, TO LIFT AUTOMATIC STAY AND FOR SANCTIONS, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **O R D E R E D** THAT THE PORTION OF THE MOTION REQUESTING LIFTING OF THE AUTOMATIC STAY IS DISMISSED. THE PORTION OF THE MOTION REQUESTING MONETARY SANCTIONS IS DENIED. IT IS FURTHER ORDERED THAT THE PORTION OF THE MOTION REQUESTING DISMISSAL OF THE APPEAL AS FRIVOLOUS IS GRANTED.

BY THE COURT,
s/Paul Hartan
ASSISTANT CLERK-APPELLATE

NOTICE SENT: JULY 14, 2004
RYAN, RYAN, JOHNSON & DELUCA, LLP
KAREN A. MURPHY, PRO SE
KATHLEEN A. MURPHY, PRO SE
HON. WILLIAM B. LEWIS
CLERK, SUPERIOR COURT, STAMFORD-NORWALK CV00 0180296S
PAC

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APPELLATE COURT

STATE OF CONNECTICUT

AC 24754

KENNETH A. SCHWARTZ

V.

KAREN A. MURPHY ET AL.

SEPTEMBER 13, 2004

ORDER

THE MOTION OF THE DEFENDANTS-APPELLANT, FILED JULY 23, 2004, FOR RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **O R D E R E D** GRANTED. IT IS FURTHER ORDERED, SUA SPONTE, THAT THIS APPEAL WILL BE LISTED ON THE COURT'S OWN MOTION CALENDAR AT A DATE TO BE DETERMINED, AS TO WHETHER OR NOT THE APPEAL SHOULD BE DISMISSED AS FRIVOLOUS.

FLYNN, J. RECUSED

BY THE COURT,

s/Paul Hartan
ASSISTANT CLERK-APPELLATE

NOTICE SENT: SEPTEMBER 14, 2004
RYAN, RYAN, JOHNSON & DELUCA, LLP
KAREN A. MURPHY, PRO SE
KATHLEEN A. MURPHY, PRO SE
CLERK, STAMFORD/NORWALK J.D.
(CV00-0180296S)
HON. WILLIAM B. LEWIS

082/042076

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APPELLATE COURT STATE OF CONNECTICUT

NO. A.C. 24754

KENNETH A. SCHWARTZ

V.

KAREN A. MURPHY, ET AL

OCTOBER 20, 2004

ORDER

AFTER HEARING AS TO WHY THE APPEAL SHOULD NOT BE DISMISSED AS FRIVOLOUS, IT IS HEREBY ORDERED THAT THE MATTER IS DISMISSED. "

*FLYNN, J. RECUSED.

BY THE COURT,

s/Paul Hartan
DEPUTY CHIEF CLERK

NOTICE SENT: OCTOBER 21, 2004
RYAN, RYAN, JOHNSON & DELUCA, LLP
KAREN A. MURPHY, PRO SE
KATHLEEN A. MURPHY, PRO SE
JD, STAMFORD, CV00 0180296S
HON. WILLIAM B. LEWIS
TOPAC

bjm 17S/042388

APPELLATE COURT

STATE OF CONNECTICUT

AC 24754

KENNETH A. SCHWARTZ

V.

KAREN A. MURPHY ET AL.

December 16, 2004

ORDER

THE MOTION OF THE DEFENDANTS-APPELLANTS, FILED NOVEMBER 1, 2004, FOR RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **ORDERED** DENIED.*

*FLYNN, J. RECUSED.

BY THE COURT,

S/Paul Hartan
DEPUTY CHIEFCLERK

NOTICE SENT: 12/17/04
RYAN, RYAN, JOHNSON & DELUCA,
LLP KAREN A. MURPHY, PRO SE
KATHLEEN A. MURPHY, PRO SE
HON. WILLIAM B. LEWIS
CLERK, J.D. OF STAMFORD-NORWALK (CV00-0180296S)

Bjm 391/042429

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-04-0279

Kenneth Schwartz

V.

Karen A. Murphy et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendants for certification to appeal from the Appellate Court [AC 24754], it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

s/Alan M. Gammuscio
ASSISTANT CLERK-APPELLATE

Dated: 3/2/2005
Notice sent: 3/2/05
Clerk, Superior Court, Stamford/Norwalk CV00 180296
Clerk, Appellate Court
Reporter of Judicial Decisions
SAO
Karen A. Murphy, pro se
Kathleen A. Murphy, pro se
Ryan, Ryan, Johnson & DeLuca, LLP

Karen A. Murphy, pro se and Kathleen A. Murphy, pro se in support of petition; James A. Mahar and J. Paul Johnson in opposition.

Bjm

FIFTH AMENDMENT TO THE U.S. CONSTITUTION

Amendment Text

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sec. 60-2. Supervision of Procedure

The supervision and control of the proceedings on appeal shall be in the court having appellate jurisdiction from the time the appeal is filed, or earlier, if appropriate, and, except as otherwise provided in these rules, any motion the purpose of which is to complete or perfect the trial court record for presentation on appeal shall be made to the court in which the appeal is pending. The court may, on its own motion or upon motion of any party, modify or vacate any order made by the trial court, or a judge thereof, in relation to the prosecution of the appeal. It may also, for example, on its own motion or upon motion of any party, (1) order a judge to take any action necessary to complete the trial court record for the proper presentation of the appeal; (2) when it appears that by reason of omission from the prepared record of matters of record in the trial court the questions of law in the case are not properly presented, order the appellant to cause to be photocopied the portions so omitted; (3) order improper matter stricken from the record or from a brief or appendix; (4) order a stay of any proceedings ancillary to a case on appeal; (5) order the addition to the prepared record of parts of the file necessary to present correctly or fully the matters comprehended by Sections 67-4 and 67-5; (6) order that a party for good cause shown may file a late appeal, petition for certification, brief or any other document, unless the court lacks jurisdiction to allow the late filing; (7) order that a hearing be held to determine whether it has jurisdiction over a pending matter; (8) order an appeal to be dismissed unless the appellant complies with specific orders of the trial court, submits to the process of the trial court, or is purged of contempt of the trial court; (9) remand any pending matter to the trial court for the resolution of factual issues where

necessary; (10) correct technical or other minor mistakes in a published opinion which do not affect the rescript.

(P.B. 1978-1997, Sec. 4183.)

Sec. 68-3. Record Contents

The appellate clerk, in preparing the record, must study the case with sufficient care, must study the revised designation of specific pleadings, submitted pursuant to Section 63-4(a) (2), and the brief of the appellant, and may confer with counsel, and, if necessary, with the clerk of the trial court, to determine what part of the case file should become the record. The appellate clerk should include nothing in the record which is not necessary for the proper presentation of the statement of issues or for the proper presentation of questions reserved.

No officer's return or exhibit, except as provided herein, shall be photocopied unless it is at issue in the appeal. The record returned to the trial court by an administrative agency shall, even though incorporated by reference in a pleading, not be photocopied except to the extent provided in Section 68-10. In the discretion of the appellate clerk, exhibits annexed to a pleading may be photocopied so far as they are relevant to any issue presented in the appeal and are not excessive in length.

(P.B. 1978-1997, Sec. 4086.) (Amended Oct. 10, 2001, to take effect Jan. 1, 2002.)

Sec. 85-1. Lack of Diligence in Prosecuting or Defending Appeal

If a party shall fail to prosecute an appeal with proper diligence, the court may dismiss the appeal with costs. If a party shall fail to defend against an appeal with proper diligence, the court may set aside in whole

or in part the judgment under attack, with costs, and direct the entry of an appropriate final judgment by the trial court against the party guilty of the failure. If that party is a defendant in the action, the directed judgment may be in the nature of a judgment by default for such amount as may, upon a hearing in damages, be found to be due. If that party is a plaintiff in the action, the directed judgment may be one dismissing the action as to that plaintiff, and the judgment shall operate as an adjudication upon the merits. The statutory provisions regarding the opening of judgments of nonsuit and by default shall not apply to a judgment directed under the provisions of this rule.

(P.B. 1978-1997, Sec. 4184A)

Sec. 85-3. Procedure on Sanctions

Sanctions may be imposed by the court, on its own motion, or on motion by any party to the appeal. A motion for sanctions may be filed at any time. A hearing at which any party may be heard shall be held before the imposition of any sanction.

(P.B. 1978-1997, Sec. 4184C.)

Karen A. Murphy
68 Saddle Rock Road
Stamford CT 06901
(203) 324-1423

December 19. 2001

Ms. Susan C. Reeve, Assistant Clerk
Appellate Court
231 Capitol Avenue
Drawer Z, Station A
Hartford, CT 06106

RE: A.C. 22318: Contents of the "Photo Duplicated Record"

Dear Susan:

As requested I have enclosed the original Photo Duplicated Record you previously forwarded to me. At your suggestion, I also prepared and filed a Motion for Review regarding the Photo Duplicated Record.

In the Motion for Review I made no reference to the trial transcript or to the exhibits, including the exhibits marked for identification, to the transcript. You indicated to me on a December 18, 2001, phone call that this was not necessary and will not impact my appeal rights in any manner by omitting the transcript (together with all exhibits) from the Motion.

If you have any questions regarding my concerns with the Photo Duplicated Record, please let me know.

Sincerely,

s/Karen A. Murphy
Karen A. Murphy

cc: J. Paul Johnson, Esq.

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JULY TERM 2001

SUPERIOR COURT JUDICIAL DISTRICT OF
STAMFORD/NORWALK AT STAMFORD

APPELLATE COURT NO. A.C.: 22318

KENNETH A. SCHWARTZ

VS.

KAREN A MURPHY, ET AL

MOTION FOR REVIEW

FOR THE DEFENDANTS KAREN A. MURPHY AND
KATHLEEN A. MURPHY

Karen A. Murphy
Plaintiff Pro Se
68 Saddle Rock Road
Stamford, CT 06902

Kathleen A. Murphy
Plaintiff Pro Se
68 Saddle Rock Road
Stamford, CT 06902

MOTION FOR REVIEW

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE APPELLATE COURT:

In order to fully argue the statement of issues submitted to the Appellate Court, the undersigned are requesting that the RECORD to be used for photocopying in this matter be expanded to include (i) the four trial briefs and (ii) the exhibits attached to the "Motion For Nonsuit Of Plaintiff's Complaint ...." The subject RECORD was prepared by Ms. Susan C. Reeve, case manager and Assistant Clerk, pursuant to Chapter 68 of the Practice Book ("PB"). The undersigned respectively represent:

(1) Karen A. Murphy and Kathleen A. Murphy are named defendants in the above-entitled action (collectively, the "defendants-appellants").

(2) The defendants-appellants, in good faith, attempted to articulate their concerns about the inadequacies of the subject RECORD prepared by Ms. Reeve, pursuant to Chapter 68 of the PB.

(3) Ms. Reeve did not confer with the defendants-appellants in preparing the subject RECORD. Ms. Reeve also

represented to defendant-appellant, Karen A. Murphy, that she did not confer with plaintiff-appellee's counsel or with the trial court clerk in preparing this RECORD.

(4) Ms. Reeve suggested and recommended that the defendants-appellants prepare this Motion for Review pursuant to PB § 66-6.

(5) In an effort to save the time and expense associated with a Motion for Review, defendant-appellant Karen A. Murphy asked Mr. Francis J. Drumm, Jr., the Chief Clerk of the Appellate Clerk, to review Ms. Reeve's decision regarding the contents of the RECORD. Mr. Drumm indicated that it was his practice not to overrule the decision of the Assistant Clerk.

(6) The defendants-appellants contend that the four trial court briefs and the exhibits attached to the Motion For Nonsuit must be included in the RECORD in order to properly present the statement of the issues to the Appellate Court.

Brief History Of The Case

The plaintiff issued his Complaint, dated September 13, 2000, with a return date of October 17, 2000, alleging that he has an interest in a view easement over the northeast corner of

defendants' property. In their Answer, dated October 10, 2000, the defendants denied plaintiff's allegations and set forth six special defenses and three counterclaims. The trial was heard before Judge Lewis on March 1, 2001. The matter was fully briefed, with the (i) Defendant's Memorandum Of Law issued on April 20, 2001; (ii) Plaintiff's Trial Brief issued on April 20, 2001; (iii) Defendant's Reply issued on May 4, 2001; and (iv) Plaintiff's Reply To Defendant's Reply Brief issued on May 10, 2001.

Pursuant to Judge Lewis' Memorandum of Decision, dated August 30, 2001, an injunction was issued requiring defendants to maintain certain hedges and a tree in accordance with court-ordered specifications in connection with its holding that plaintiff did have an enforceable view easement over a triangular section of defendants' property and that defendants had violated said view easement. This appeal seeks to reverse the trial court's judgement and obtain a ruling in favor of defendants' special defenses and counterclaims.

Specific Facts Upon Which The Moving Party Relies

Trial Court Briefs

The four trial court briefs, submitted by both the plaintiff and the defendants, are needed in the Appellate Court RECORD, not for their argument content, but in order to document and verify (i) several critical admissions and omissions made by the plaintiff and (ii) several false allegations contained in the plaintiff-appellee's brief. The statement-of-issues reasons why each of the four trial briefs should be part of the RECORD are summarized as follows:

(1) Plaintiff's Trial Brief: Plaintiff's Trial Brief, issued on April 20, 2001, should be included in the RECORD because it directly relates to the proper presentation of issue #2 in the statement of principal issues. The defendants-appellants' brief commences its discussion of issue #2 on page 20, under the heading, "The Complaint Was Improperly Amended." If the Plaintiff's Trial Brief is included in the RECORD, then the defendants-appellants will be able to show that the plaintiff-appellee's motion (if any such motion is deemed to have been made) to amend his Complaint was either abandoned or failed to

be prosecuted by the plaintiff. During the one day trial on March 1, 2001, Judge Lewis noted that (see transcript page 82, lines 6-7) that this motion to amend issue did not have to be fully argued at trial because "this is good briefing material." The Plaintiff's Trial Brief, however, is silent on this motion to amend issue, a clear indication that the plaintiff either abandoned this issue or simply chose not to prosecute the issue.

(2) Plaintiff's Reply To Defendant's Reply Brief:

Plaintiff's Reply To Defendant's Reply Brief, issued on May 10, 2001, should be included in the RECORD because it directly relates to the proper presentation of issue #4 in the statement of principal issues. The defendants-appellants' brief commences its discussion of issue #4 on page 29, under the heading, "Ignored Settled Law In Arbitrarily Imposing Height And Pruning Requirements." If this brief is included in the RECORD, then the defendants-appellants will be able to show that (i) the plaintiff's admissions made therein contradict plaintiff's allegations made in his Complaint and (ii) the trial court's imposed injunction on defendants serves no purpose and is completely arbitrary.

In paragraph 5 of plaintiff's Complaint, he alleged that defendants "... have continually violated this View Easement by allowing the hedge on this area to grow above six (6) feet in height and by allowing a tree to remain within the Easement area." Notwithstanding this knowingly false allegation, the plaintiff attempted to amend his Complaint in Plaintiff's Reply To Defendant's Reply Brief, filed without the trial court's permission, by stating in its paragraph 2:

> "The Defendants also assert that the Court should not 'impose an arbitrary six foot limit on the height of the privet hedges'. The Plaintiff made this request in his complaint in an attempt to reach a reasonable compromise of the issue. If the Defendant is correct, then the Plaintiff requests that the Court order that the entire hedge be removed as the hedge at six feet does in fact block his view from the lower part of his property in contravention of the view easement."

Not only does this plaintiff Reply stand in direct opposition to his Complaint, the above passage renders the trial court's imposed injunction on defendants as serving no purpose. On page 10 of its Memorandum of Decision, the trial court concluded that "... an injunction issues that the defendants shall

keep their hedge ... to a height of not more than six feet ...." Based on plaintiff's Reply, the subject hedge, even at a height of six feet, violates the so-called View Easement. Further, the defendants have raised an "unclean hands" special defense in this matter.

(3) Defendants' Memorandum Of Law: The Defendant's Memorandum Of Law, issued on April 20, 2001, should be included in the RECORD because it directly relates to the proper presentation of issues #1 and #2 in the statement of principal issues. The defendants-appellants' brief commences its discussion of issue #1 on page 17, under the heading, "Plaintiff's Evidence Was Improperly Admitted." As noted earlier, the discussion of issue #2 ("The Complaint Was Improperly Amended") begins on page 20. If Defendant's Memorandum Of Law is included in the RECORD, then the defendants-appellants will be able to refute the knowingly false allegations contained in plaintiff-appellee's brief that the defendants' counsel never objected to the admissibility of plaintiff's Exhibit 16 and never objected to plaintiff's construction of the pleadings that construed the alleged easement to be located in the southeast corner of defendants' property.

With respect to issue #1, the plaintiff-appellee's brief contends that defendants' counsel did not object to the admissibility of plaintiff's Exhibit 16. Note that Exhibit 16 was admitted into evidence about a week after the trial ended and the documents contained therein differed from those offered in plaintiff's Exhibit 16 (marked for identification). As evidenced by Defendant's Memorandum Of Law, the defendants clearly objected to this ex parte communication.

With respect to issue #2, the plaintiff-appellee's brief (see footnote 1 at page 1) makes the following knowingly false statement:

> "Because defendants never objected to said construction of the pleadings, plaintiff and the trial court continually designated the easement in the southeast corner of the defendants' property. Plaintiff will therefore describe the location as 'southeast' throughout the brief."

The Defendant's Memorandum Of Law clearly shows that the defendants objected to the admission into evidence of (i) plaintiff's Exhibit 16 and (ii) the Dunaway-Contegni agreement precisely because they are both irrelevant to an alleged view

easement claim in the northeast corner of defendants' property. Further, the Defendant's Memorandum Of Law is needed to show that the defendants-appellants never agreed to any construction of the pleadings that would permit the plaintiff to amend his Complaint and change the location of the alleged view easement form the northeast to the southeast corner of plaintiff's property. Moreover, the Defendant's Memorandum Of Law is needed to show that Judge Lewis' Memorandum of Decision was materially deficient because it made no attempt to reconcile or explain the many different locations alleged for the easement (e.g., the northeast and southeast corners of defendants' property; the southwest corner of the premises or Lot No. 1 of the four lot subdivision). Judge Lewis' arbitrary and capricious typographical error theory (see footnote 1 on page 5 of his Memorandum of Decision) has no legal or factual basis.

(4) Defendants' Reply: Defendant's Reply, issued on May 4, 2001, should be included in the RECORD because it also directly relates to the proper presentation of issue #2 in the statement of principal issues. As noted above, the plaintiff-appellee's brief (see footnote 1 at page 1) alleges that the

defendants never objected to plaintiff's preposterous argument that "northeast" means "southeast" and visa versa. The Defendants' Reply brief, which is particularly critical of plaintiff's incessant mischaracterization of the location of the area where a view easement is claimed, further clarifies and unequivocally contradicts plaintiff's knowingly false allegation. Further, the Defendant's Reply brief is also needed to further illustrate that Judge Lewis' Memorandum of Decision inexplicably failed to even attempt to reconcile or explain the many different locations alleged for the easement.

Exhibits Attached To Motion for Nonsuit

Although the defendants' "Motion For Nonsuit Of Plaintiff's Complaint ...", dated December 11, 2000, has been included in this RECORD, its attached exhibits (A through D) have been excluded by the case manager. The exhibits attached to the Motion For Nonsuit should be included in the RECORD because they directly relate to the proper presentation of issue #5 in the statement of principal issues. The defendants-appellants' brief commences its discussion of issue #5 on page 32, under the

heading, "Applicability of Statute of Limitations and Adverse Possession."

The plaintiff-appellee's brief contains a series of knowingly false statements on pages 18 through 20. In short, the plaintiff-appellee states that, among other things, the alleged view easement violations did not occur until after the defendants-appellants acquired the property. Because of these knowingly false statements, the plaintiff-appellee was able to conclude that the statute of limitations and adverse possession arguments made by the defendants-appellants simply did not apply.

The defendants-appellants recognize that PB § 68-3 gives the Appellate Clerk considerable discretion with respect to determining which exhibits will be photocopied in the RECORD. If the exhibits to defendants' Motion For Nonsuit (e.g., Plaintiff's Response to Requests for Admission; Plaintiff's Answers to Interrogatories) are included in the RECORD, then, as further explained on pages 15 through 17 of defendants-appellants' reply brief, the defendants-appellants will be able to refute the knowingly false statements contained in plaintiff-appellee's brief about issue #5. The defendant-appellant, Karen A. Murphy,

prepared the case up to the trial and also had a pro se appearance. Notwithstanding, and despite repeated requests made to Judge Lewis, Ms. Murphy was denied the opportunity to be heard at trial. If Ms. Murphy had been permitted to be heard at trial, then the need for these exhibits to be included in the RECORD would be less compelling.

Finally, these exhibits directly relate to the defendants' "unclean hands" special defense and the proper presentation of issue #6 in the statement of principal issues. The defendants-appellants' brief commences its discussion of issue #6 on page 35, under the heading, "Plaintiff's Letter Of July 3, 2000 Was Improperly Excluded From Evidence."

Legal Grounds Upon Which The Moving Party Relies

As the Appellate Court case manager assigned to this matter, Ms. Reeve submitted, on December 12, 2001, a notice to the defendants-appellants which attached the "RECORD" to be used for photocopying. The defendants-appellants verbally requested of Ms. Reeve that the RECORD be changed to include (i) the four trial briefs and (ii) the exhibits attached to the Motion For Nonsuit. The defendants-appellants have indicated that this

expanded RECORD is necessary in order to fully argue the statement of issues before the Appellate Court. Ms. Reeve denied defendants-appellants' request to change the RECORD. With respect to the "perfecting of the record for an appeal," the defendants-appellants make this Motion For Review of the RECORD prepared by Ms. Reeve, pursuant to PB § 66-6.

During a telephone discussion on December 17, 2001, Ms. Reeve indicated to defendant-appellant, Karen A. Murphy, that PB § 66-6 was the proper section to cite for this Motion For Review. During a separate telephone discussion on December 17, 2001 with Mr. Francis J. Drumm, Jr., the Chief Clerk of the Appellate Clerk, the defendants-appellants were again advised of the applicability of PB § 66-6. In summary, Ms. Reeve and Mr. Drumm indicated that, although PB § 66-6 does not specifically refer to Chapter 68 of the Practice Book, the Appellate Court practice for such reviews was pursuant to PB § 66-6.

During the above referenced telephone conversation of December 17, 2001, defendant-appellant Karen A. Murphy summarized the "statement of issues" reasons for including the four trial court briefs in the RECORD being prepared for the

Appellate Court. Ms. Reeve stated, among other things, that it was the Appellate Court's practice to exclude briefs from the RECORD. The Practice Book does not specifically exclude trial briefs from the RECORD at the Appellate Court.

Further, and without any discussion of the facts of the case with defendant-appellant Karen A. Murphy, Ms. Reeve also indicated that, pursuant to the discretion provided in the last sentence of PB § 68-3, the exhibits to the Motion For Nonsuit were excluded from the RECORD. The defendants-appellants argue that the four trial court briefs and the exhibits attached to the Motion For Nonsuit have a direct bearing on the consideration of the statement of issues.

Finally, during the above referenced telephone conversation of December 17, 2001, Ms. Reeve mentioned that any change to add the aforementioned briefs and exhibits to the RECORD would likely be met with a Motion to Strike from the plaintiff-appellee. In summary, there was no legal or factual basis for Ms. Reeve to rule that the above documents were not necessary for the proper presentation of the statement of the issues.

Ms. Reeve indicated that it was not necessary to attached to this Motion the RECORD she submitted pursuant to Chapter 68 of the PB.

WHEREFORE, for the reasons herein stated, the defendants-appellants respectively request that this Appellate Court amend the Record to include the documents referred to in this Motion.

Dated at Stamford, Connecticut, this 19th day of December, 2001.

THE DEFENDANTS-APPELLANTS
KAREN A. MURPHY AND KATHLEEN A. MURPHY

By s/Karen A. Murphy
Karen A. Murphy
Plaintiff Pro Se
68 Saddle Rock Road
Stamford, CT 06902
(203)-324-1423
(203)-324-9797

s/Kathleen A. Murphy
Kathleen A. Murphy
Plaintiff Pro Se
68 Saddle Rock Road
Stamford, CT 06902
(203)-324-1423
(203)-324-9797

CV 00 0180296 S

	) SUPERIOR COURT
	) JUDICIAL DISTRICT OF
KENNETH A. SCHWARTZ	) STAMFORD/NORWALK
	) AT STAMFORD
VS.	)
	)
	)
KAREN A. MURPHY and	)
KATHLEEN A. MURPHY	)

July 23, 2003

ORAL ARGUMENT REQUESTED
JUDICIAL NOTICE REQUESTED

MOTION TO OBJECT TO THE PROPOSED ORDER CONTAINED IN THE NOTICE DATED JULY 14, 2003

Pursuant to the Superior Court's Notice dated July 14, 2003, the defendants object to the five-part proposed Order, in particular parts 2 through 5, contained in the subject Notice because the proposed Order fails, inter alia, to "determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with [the Appellate Court's] opinion," as directed by the Appellate Court.[3]

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[1] See Kenneth A. Schwartz v. Karen A. Mushy et al. (AC 22318). The Appellate Court, in a decision officially released on December 24, 2002, "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion."

In accordance with the July 14th Notice, . the defendants provided a copy of this objection to the attention of Julie Pinto-Dworkin, Assistant Clerk.

Overview

As discussed below, the proposed Order fails to comply with the Appellate Court's direction because, in large part, through no fault of the defendants, relevant material facts were not brought before the Superior Court. Accordingly, and as discussed below, the defendants respectfully request that the Court (i) take judicial notice of newly discovered "relevant extrinsic evidence" pertaining to a neighboring subdivision on the southeast side of plaintiff's property; and (ii) set aside the submission and reopen the case to admit the testimony of Robin M. Stein, Jr., the Land Use Bureau Chief for the City of Stamford, in connection with the letter dated June 14, 1978 from the Planning Board of the City of Stamford[4] and the aforementioned subdivision.. This new evidence makes it clear that there is no basis for the Court to issue an Order to remove, cut or trim the subject hedges and tree on defendants' property in order to comply with the directive of the Appellate Court.

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[4] This June 14, 1978 letter, which was included in plaintiff's Exhibit 16, is attached hereto as Exhibit F.

In the alternative, the defendants request that a new trial pursuant to Connecticut Practice Book ("PB"), § 17-4A be granted if the Court determines that this new evidence can not be admitted at this time. In the light of this new evidence, the Court will be able to accurately and precisely "determine the respective rights and obligations of the parties with respect to the maintenance of the view easement."

The Admission Of Newly Discovered Evidence Is Requested In Order To Promote Justice By Bringing All Facts Before The Court

In order to promote justice by bringing all the facts before the Superior Court, the defendants respectfully request that this Court set aside the submission and reopen the case to admit newly discovered "relevant extrinsic evidence" pertaining to, *inter alia,* the statements made by Robin M. Stein, Jr., the Land Use Bureau Chief for the City of Stamford, in connection with (i) Subdivision Appl. No. 3707, Ocean Drive West--Lot 25, Denham Approved May 5, 1998; and (ii) the letter dated June 14, 1978 from the Planning Board of the City of Stamford.

These documents, together with Mr. Stein's statements, make it clear that (i) the alleged six foot requirement for, inter alia, the existing hedge on defendants' property actually applies to

another neighbor's property and (ii) the Planning Board has never required any party to remove, cut or trim any planting that existed in a restricted area at the time such restriction was imposed. The defendants' hedges and Siberian elm tree have existed long before the restrictions applicable to the northeast corner of defendants' property were imposed by the Planning Board.

Subdivision Appl. No. 3707 and Map # 12924

The defendants did not learn about Subdivision Appl. No. 3707, Ocean Drive West--Lot 25, Denham Approved May 5, 1998 (attached hereto as Exhibit A), inclusive of the "Subdivision" Map Depicting 367 Ocean Drive West Stamford, Connecticut Prepared For Mark Denham," Map # 12924 (attached hereto as Exhibit B) until well after the Hearing. The defendants request judicial notice of Exhibits A and B. This Subdivision is located on the southeastern side of plaintiff's property. [35] In discussing the "View Corridor" of the Denham Subdivision, condition 11 j of the Planning Board Certificate states, in relevant part:

> "No structure (except the driveway) shall be built in said View Corridor, and, except for existing plantings, no new plantings shall be permitted

[5] The Planning Board Certificate, as well as the conditions of said Certificate, granted to Mark Denham (Appl. No 3707) are recorded in the City of Stamford's Land Records at Vol 4985, pp. 243-245.

therein to a height greater than 6 feet." (emphasis added).

The Denham Subdivision, inclusive of Map # 12924, is the obvious source of the falsely alleged six foot height restriction for the existing hedges. Recall that the plaintiff alleged that defendants have "... continually violated this View Easement by allowing the hedge on this area to grow above six (6) feet in height and by allowing a tree to remain within the Easement area."[6] During the last week of December 2002, defendant Karen A. Murphy met with Mr. Stein to discuss, *inter alia,* the restrictions in the Denham Subdivision. Mr. Stein stated that the Planning Board never required Stamford property owners to cut existing plantings, to include bushes and trees, at the time when such restrictions are imposed. *See* paragraph 10 of Karen A. Murphy's affidavit, attached hereto as Exhibit E.

Planning Board Letter Dated June 14, 1978

On January 2, 2003, defendant Karen A. Murphy met with Mr. Stein to discuss the letter dated June 14, 1978 from the Planning Board of the City of Stamford approving Subdivision #

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[6]*See* Plaintiff's Complaint, para. 5. Moreover, recall that on May 4, 2001, the defendants filed a Reply Brief. The plaintiff elected not to file a Reply Brief, but instead filed on May 10, 2001, without court permission, Plaintiff's Reply To Defendants' Reply Brief. In this Surreply, the plaintiff admitted that he had no basis for his falsely alleged six (6) foot limitation alleged in the Complaint.

2977 and the Staff Alternate Plan (see Murphy Aff.; para. 4; Exhibit E). During that meeting, Mr. Stein stated that he thought the restriction noted in paragraph 2 of the June 14, 1978 letters[7] (that "no accessory structures or view obstruction be placed in a triangular area 50 x 95 x 110 ft at its southeasterly corner") was meant to be located in the northeast corner of Lot 3 (defendants' property), not the southeasterly corner (see Murphy Aff.; paras. 5 and 6; Exhibit E). Further, Mr. Stein stated that the City of Stamford never required a party to remove, cut or trim a planting that existed in the restricted area at the time such restriction was imposed (see Murphy Aff ; para. 7; Exhibit E).

Mr. Stein's statement about the intended northeast location of the restricted triangle is consistent with the "typographical" and "scrivener's" errors theories set forth by the Superior Court and the Appellate Court and confirms that the June 14, 1978 letter from the Planning Board is the genesis of the restriction on the defendants' property. This June 14, 1978 letter makes no reference to any removing, cutting or trimming of bushes or trees in the restricted triangular area of defendants' property.

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[7] See Exhibit F.

BEST AVAILABLE COPY

Later on January 2, 2003, defendant Karen A. Murphy sent an e-mail to Mr. Stein (attached hereto as Exhibit C), along with an attached draft affidavit (attached hereto as Exhibit D) which summarized the discussions which had taken place between Murphy and Stein on January 2, 2003 and over the prior week. Mr. Stein's e-mail of January 2, 2003 (attached hereto as Exhibit C) indicated that he would not be able to follow through because the matter was related to litigation. In lieu of an affidavit from Mr. Stein, Karen A. Murphy's affidavit is attached hereto as Exhibit E.

Defendants Request That The Superior Court Issue A Memorandum Of Decision Which Sets Forth "The Respective Rights And Obligations Of The Parties"

In addition to their request to admit the new evidence discussed earlier, the defendants also request that the Superior Court issue a Memorandum of Decision in accordance with PB § 6-1 (a) which clearly sets forth "the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with [the Appellate Court's] opinion." Until the Superior Court complies with the rigorous requirements of this Appellate Court directive, it is premature to draft a proposed Order like that contained in the Notice dated July 14, 2003.

Moreover, there are glaring material omissions from the proposed Order. For example, the proposed Order is unclear as to the dimensions of the view easement, that is, whether the dimensions are as shown on the applicable maps or as stated in the Dunaway-Contegni Agreement. The proposed Order also fails to address the fundamental question as to how many easements now exist, which affect the property of the defendants and other third parties. Thus, in j determining the respective rights and obligations of the parties with respect to the maintenance o the view easement in accordance with the directive of the Appellate Court, the requested Memorandum of Decision should also address the following material issue questions left open by the Appellate Court:

(1) Did the Superior Court decision eliminate two easements (i.e., one in the southeast corner of defendants' property, as stated in, inter alia, the Planning Board letter of June 14, 1978 and defendants' deed; and the one on the southwestern corner of a third party's property, as stated in the unpled Dunaway-Contegni Agreement).

(2) Did the Superior Court decision subject the defendants' property to two easements (i.e., one in the northeast corner of the property as pled and as shown on the applicable maps, and one in the southeast corner of the property as noted above).

(3) Are the dimensions of the view easement as shown on the applicable maps or as stated in the Dunaway-Contegni Agreement.

The Proposed Order Fails To Comply With The Appellate Court's Direction

As detailed below, the proposed Order fails to comply with the Appellate Court's direction because, inter alia, the new and material evidence discussed above was never brought before the Superior Court. If the Court reopens the case to admit this additional new evidence, then the problems associated with parts two through five of the proposed Order (see below) would become obvious.

The Appellate Court concluded that the Superior Court "improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement." The improper injunction stated that "the defendants shall keep their hedge and any other bushes in the area of the view easement to a height of not more than six feet, and shall keep the tree trimmed and pruned so that it is reasonably similar in shape and height to the way it existed in September of 2000, when this lawsuit began."

The Appellate Court did not determine what the respective rights and obligations of the parties were with respect to the view easement. Instead, it "remanded with direction to dissolve the injunction and to determine the respective rights and

obligations of the parties with respect to the maintenance of the view easement in accordance with [the Appellate Court's] opinion."

Part one of the five-part proposed Order dissolves the "mandatory injunction" as directed by the Appellate Court, but, as noted below, parts two through five fail to determine the "respective rights and obligations of the parties."

- Part two of the proposed Order incorrectly assumes that the phrase "maintain the view easement" has been defined by the Superior Court consistent with the respective rights and obligations of the parties;

- Part three incorrectly assumes that the following words or phrases have been defined by the Court consistent with the respective rights and obligations of the parties: "maintain the easement," "reasonably necessary," "enjoyment of the view easement," and "unreasonably harm the existing hedge and tree;"

- Part four incorrectly assumes that the Court has determined the respective rights and obligations of the parties in connection with the length of the existing hedge and the trimming specifications of the Siberian elm tree; and
- Part five incorrectly assumes that there is a legal basis for the statement permitting the plaintiff or his agents to enter defendants' property to complete the maintenance work

which is incorrectly and generally set forth
in part four of the proposed Order.

As indicated above, the Superior Court has not determined the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with the directive of the Appellate Court. Instead, the proposed Order, if enacted, would effectively constitute an unintended deed reformation in that the proposed Order would change the material facts (e.g., notations) associated with, *inter alia, (i)* the defendants' deed; (ii) the notations on the applicable maps (e.g., Map #12226); and (iii) the terms of the Dunaway-Contegni Agreement.[8]

Summary

The material new evidence discussed above shows that (i) the view easement alleged by the plaintiff applies not to the defendants' property but to a third party's property located on the southeasterly side of plaintiff's property, and (ii) the restriction in the northeast corner of defendants' property was a restriction imposed by the Planning Board of the City of Stamford. Further, to reform the defendants' deed, the Dunaway-Contegni

[8]To reform the defendants' deed, the Dunaway-Contegni Agreement, and Map #12226 in the manner suggested b the proposed Order of Judge Lewis is inconsistent with the law of deed reformation, as well as the "typographical' and "scrivener's" error theories employed by the courts to-date.

Agreement and Map # 12226 in the manner suggested by the proposed Order is inconsistent with the law of deed reformation, as well as the "typographical" and "scrivener's" error theories employed by the Courts to date.

In order to "determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with [the Appellate Court's] opinion," as directed by the Appellate Court, the defendants respectfully request that the Court set aside the submission and reopen the case to admit newly discovered "relevant extrinsic evidence" pertaining to (i) Subdivision Appl. No. 3707 and Map # 12924; and (ii) the Planning Board Letter Dated June 14, 1978. This new evidence makes it clear that there is no basis for the Court to issue an Order to remove, cut or trim the subject hedges and tree on defendants' property in order to comply with the directive of the Appellate Court.

In the alternative, the defendants request that a new trial pursuant to PB § 17-4A be granted if the Court determines that this new evidence can not be admitted at this time. In the light of this new evidence, the Court will be able to accurately and

precisely "determine the respective rights and obligations of the parties with respect to the maintenance of the view easement."

In summary, the defendants object to the five-part proposed Order, in particular parts 2 through 5, contained in the subject Notice because the proposed Order fails, inter alia, to "determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with [the Appellate Court's] opinion," as directed by the Appellate Court. The defendants request that the Superior Court issue a Memorandum of Decision in accordance with PB § 6-1 (a) which clearly sets forth "the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with [the Appellate Court's] opinion."

ORAL ARGUMENT REQUESTED
JUDICIAL NOTICE REQUESTED

By: s/ Karen A. Murphy
Karen A. Murphy,
Plaintiff Pro Se
68 Saddle Rock Road
Stamford, Connecticut
(203)-324-1423
(203)-324-9797

s/Kathleen A. Murphy
Kathleen A. Murphy
Plaintiff Pro Se
68 Saddle Rock Road
Stamford, Cnnecticut
(203)-324-1423
(203)-324-9797

APPENDIX

APPENDIX
TABLE OF EXHIBITS

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Exhibit A: The Planning Board Certificate, together with the Conditions of Subdivision Appl. No. 3707, Ocean Drive West--Lot 25, Denham Approved May 5, 1998 Map. (Note condition 11).	A3
Exhibit B: Map # 12924, referred to as "Subdivision Map Depicting 367 Ocean Drive West Stamford, Connecticut Prepared For Mark Denham."	A6
Exhibit C: An exchange of e-mails, dated January 2, 2003, between plaintiff Karen A. Murphy and Robert M. Stein, Jr., the Land Use Bureau Chief for the City of Stamford, in connection with obtaining an affidavit	A7
Exhibit D: A draft affidavit prepared for Mr. Stein's review which summarized discussions which had taken place on January 2, 2003 and over the prior week between plaintiff Murphy and Mr. Stein.	A8
Exhibit E: Karen A. Murphy's affidavit, which is filed in lieu of an affidavit from Mr. Stein. His affidavit is delayed because of the necessity of internal	A10
Exhibit F: The June 14, 1978 letter from the Planning Board of the City of Stamford, which was included in plaintiff's Exhibit 16.	A12

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#3707

PLANNING BOARD CERTIFICATE 8312

I, Robert M. Stein, Jr., Planning and Zoning Director of the City of Stamford, in Compliance with Special Act No. 415 of the 1951 General Assembly, hereby, certify that on April 28, 1998, a hearing was held on an application for subdivision of property owned by Mark Denham.

Located on the following streets:

Ocean Drive West near Saddle Rock Drive

and that the following entitled map was submitted with said application:

"SUBDIVISION MAP DEPICTING 367 OCEAN DRIVE WEST STAMFORD, CONNECTICUT PREPARED FOR MARK DENHAM"

and that the following is a statement of its findings:

Application APPROVED Tuesday, May 5, 1998, with conditions (see attachment)

In accordance with CGS 8-26c, approval shall expire May 8, 2003, unless all "work", as said term is defined in CGS 8-26c(b), has been completed by said date.

Dated at Stamford, Connecticut, this 7th day of May, 1998.

s/Robert M. Stein, Jr.
Planning & Zoning Director

The land hereby affected lies in block No. 25

Filed in the Office of the Town and City Clerk of the City of Stamford, on May 7, 1998.

Conditions of Subdivision Appl. No. 3707, Ocean Drive West - lot 25, Denham APPROVED MAY 5, 1998

1) Development of Lots No. 1 and 2 shall be subject to a Coastal Site Plan Review pursuant to Section 7.1 of the Zoning Regulations Note On Record Plan)

2) Underground fuel Oil tanks shall be prohibited.

3) Streetscape plan to be prepared and submitted to the Director of Environmental protection for review and approval prior to the filing of the subdivision map

4) Site development shall not commence until a final erosion and sedimentation control plan is submitted to EPB staff for review and approval and all elements are properly installed and functional (Note on Record Plan)

5) Tree protection plan, to include all trees within designated Conservation Area and other significant trees within the property as may be identified to be preserved to be prepared by a qualified professional and submitted to EPB stall prior to the start of construction (Note to appear on Record Plan)

6) All drainage improvements to be constructed under the supervision of the project engineer with as-built plans and certifications provided prior to the issuance of any Certificates of Occupancy

7) Open Space/Conservation Area as shown on the Preliminary Subdivision Map shall be subject to Conservation Easement Agreement with agreement filed precluding further subdivision of any lot. The area so designated is 15,466 square feet and is shown in color on a map dated 1/20/98 on file in the Planning Board office (Note to appear on Record Plan)

8) Conservation areas established under the terms of "Conservation Agreement' shall be field staked with permanent markers. Iron pipes and EPB approved signage shall be installed along all property boundaries, turning points and at

intervals no less than 100 feet along continuous stretches of the boundary (Note to appear on Record Plan).

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9) Submission of a performance surety for erosion controls, tree protection measures, Streetscape improvements, drainage improvements, supervision, and preparation of as-built plans to be provided prior to issuance of the building permit for each lot.

10) Use of best management practices to protect water quality within Long Island Sound from any adverse impacts associated with surface water runoff from paved and other developed areas and drainage improvements.

11) A "View Corridor" shall be provided along the westerly boundary of "The Property" as shown on the map entitled, 'Preliminary Subdivision Map Depicting 367 Ocean Drive West," and dated 1/20/98. Said corridor shall be 35 feet in width commencing at Ocean Drive West and thence running along the westerly boundary to a point 40 feet South of the end of the accessway to lot #1 as shown on said map, thence continuing along the Westerly border of the subject premises 25 feet in width and 160' in length and thence running southerly along View Corridor Restriction line as depicted on said map to the Southerly boundary of the subject premises. No structure (except the driveway) shall be built in said View Corridor, and, except for existing plantings, no new plantings shall be permitted therein to a height greater than 6 feet.

12) The existing non-conforming apartment use over the garage on Lot 3 shall be abandoned subject to the satisfaction of the Zoning Enforcement Officer prior to filing the final subdivision map. The garage to be demolished prior to a Certificate of Occupancy on any new garage to be built on said lot.

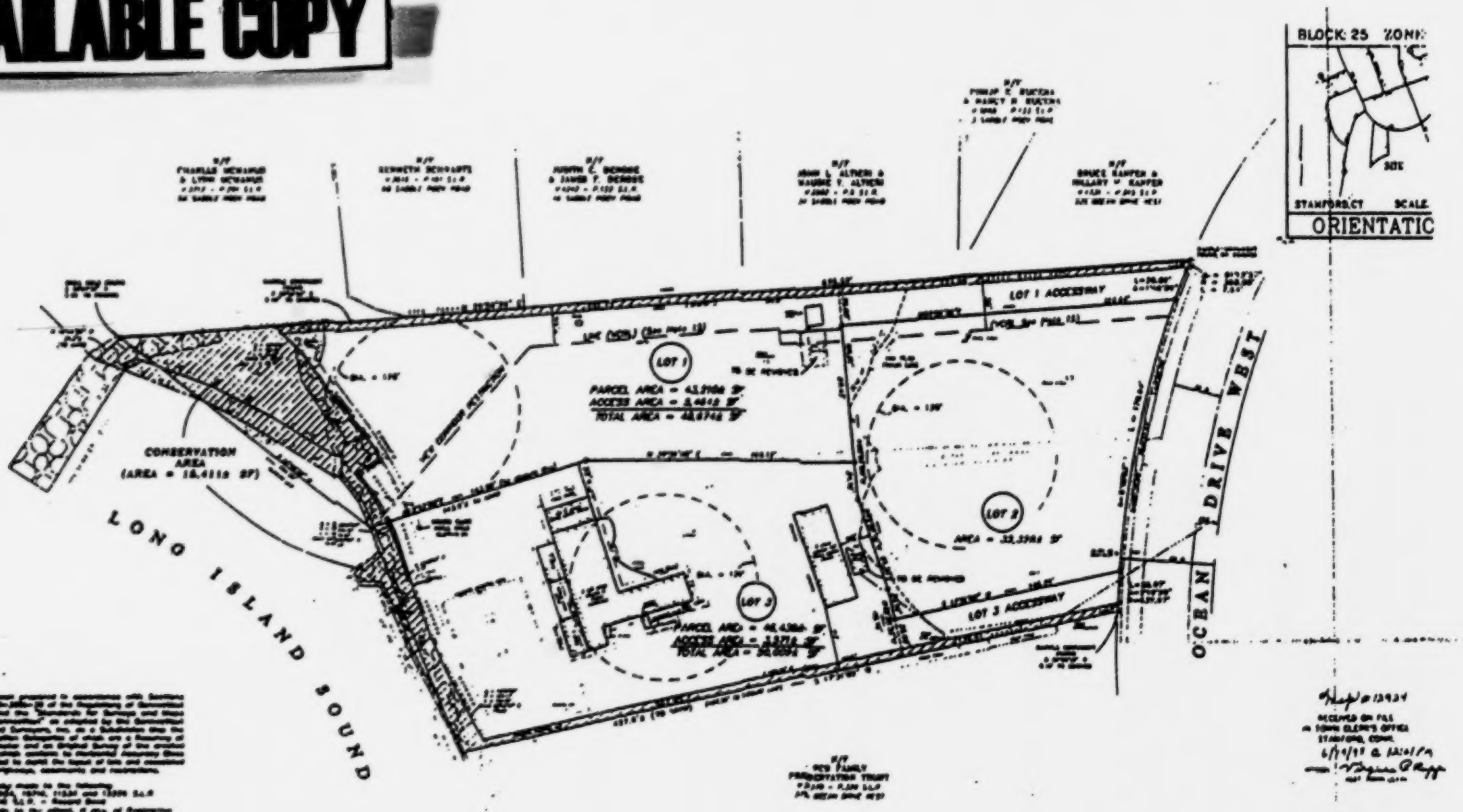
13) In accordance with CGS 8-26c, approval shall expire on May 8, 2003 unless all "work" as said term is defined in CGS 8-26c(b), has been completed by said date (note to appear on final map).

14) Subdivision reference number to be placed on final map.

15) The Planning Board finds this subdivision consistent with all applicable goals and policies of the Connecticut Coastal Management Act and has been shown that the potential adverse impacts of the proposed activity on both coastal resources and future water-dependent activities are acceptable, thereby fulfilling the requirements of the Act, C.G.S. Sections 22a-108, inclusive.

THE LAND AFFECTED HEREBY LIES IN BLOCK 25 OF THE STAMFORD BLOCK MAP, RECEITED FOR RECORD AT STAMFORD ON 5-7-98 AT 4:30 PM
ATTEST: LOU PONTBRIANT, TOWN AND CITY CLERK

BEST AVAILABLE COPY



SUBDIVISION MA

DEPICTING

367 OCEAN DRIVE WEST

STAMFORD, CONNECTICUT

PREPARED FOR

MARK DENHAM

Redniss & Me

A91

Subj. RE: Affidavit-
Date: 1/2/03 3:16:17. PM Eastern Standard Tem
From: Rstein@ ci.stamford.ct.us
To: SFGrp.aol.com
Sent. from the internet Details

Dear Ms. Murphy:

As the proposed Affidavit appears to be related to litigation, I have forwarded your draft to the Office of Legal Affairs for their review.
Robin Stein

-----Original Message--

From: SFGrp@aol.com [mailto:SFGrp@aol.com] Sent: Thursday, January 02, 2003 12:28 PM To: rstein@ci.stamford.ct.us
Subject: Affidavit

Dear Mr. Stein:

Attached a rough draft an affidavit that summarizes our discussions of earlier to day and about one week ago. If you have any questions or problems with this affidavit, please let me know.

Thank you for you help in this matter.

Karen A. Murphy

IN THE APPELLATE COURT
OF THE STATE OF CONNECTICUT

KENNETH A. SCHWARTZ	)
	)
Plaintiff,	**Appellate Court No. A. C. 22318**
v.	)
	)
KAREN A. MURPHY and	)
KATHLEEN A. MURPHY	)
	)
Defendants.	)
	)

AFFIDAVIT OF ROBERT M. STEIN, JR.

1. I, Robert M. Stein, Jr., being duly cautioned and sworn, hereby state as follows:

2. I am a resident of the City of Stamford within the State of Connecticut, am above the age of 18 years, am competent to make affidavits and make the following statements of my own personal knowledge.

3. I am the Land Use Bureau Chief for the City of Stamford within the State of Connecticut. My office is located at Stamford Government Center; 888 Washington Blvd; Stamford, Connecticut 06904-2152.

4. On January 2, 2003, Karen A. Murphy came to my office and showed me the Planning Board's June 14,

1978 letter, approving Subdivision #2977, and the Staff Alternate Plan.

5. Ms. Murphy then asked me where the Planning Board intended to locate the restriction noted in the June 14, 1978 letter that "no accessory structures or view obstruction be placed in a triangular area 50 x 95 x 110 ft ...."

6. I indicated to Ms. Murphy that I thought the restriction was meant to be in the northeast corner of Lot 3, not the southeasterly corner.

7. I also indicated to Ms. Murphy that the City of Stamford never required a party to remove, cut or trim a planting that existed in the restricted area at the time such restriction is imposed.

8. Ms. Murphy also asked me what the restriction meant. I said I would have to do a little research. Based on that research it means.....

9. About one week ago, Ms. Murphy visited me at my office to review Subdivision Appl. No. 3707, Ocean Drive West--Lot 25, Denham Approved May 5, 1998. The Planning Board Cerificate, as well as the conditions of said Certificate, granted to Mark Denham (Appl. No. 3707) and recorded in the City of Stamford's Land Records at Vol 4985

Pg 243-245. During that meeting, I advised Ms. Murphy that the map number, which was not included in the Stamford Planning Board Certificate granted to Mark Denham, was 12924.

10. I reviewed with Ms. Murphy the restrictions of the Mark Denham subdivision as set forth in paragraph 11 of the Planning Board Certificate and advised her that the Planning Board has never required Stamford property owners to cut any existing plantings, to include bushes and trees, at the time when such restrictions are imposed.

Dated January 2, 2003

_____

Robert M. Stein

Sworn to before me and subscribed in my presence this 2nd day of January, 2003.

_____

Notary Public

COMMISSION
EXPIRATION:

IN THE APPELLATE COURT
OF THE STATE OF CONNECTICUT

KENNETH A. SCHWARTZ	)
	)
Plaintiff,	)
	Appellate Court No. A. C. 22318
v.	)
	)
KAREN A. MURPHY and	)
KATHLEEN A. MURPHY	)
	)
Defendants.	)
	)

AFFIDAVIT OF KAREN A. MURPHY

1. I, Karen A. Murphy, being duly cautioned and sworn, hereby state as follows:

2. I am a resident of the City of Stamford within the State of Connecticut, am above the age of 18 years, am competent to make affidavits and make the following statements of my own personal knowledge.

3. I met with Robert M. Stein, the Land Use Bureau Chief for the City of Stamford within the State of Connecticut on January 2, 2003 and one day last week. Mr. Stein's office is located at Stamford Government Center; 888 Washington Blvd; 7th Floor; Stamford, Connecticut 06904-2152.

BEST AVAILABLE COPY

4. On January 2, 2003, I went to Mr. Stein's office and showed him the Planning Board's June 14, 1978 letter, approving Subdivision #2977, and the Staff Alternate Plan.

5. I asked Mr. Stein at the January 2, 2003, meeting where the Planning Board intended to locate the restriction noted in the June 14, 1978 letter that "no accessory structures or view obstruction be placed in a triangular area 50 x 95 x 110 ft ...."

6. He indicated to me that he thought the restriction was meant to be in the northeast corner of Lot 3, not the southeasterly corner.

7. Mr. Stein also indicated to me that the City of Stamford never required a party to remove, cut or trim a planting that existed in the restricted area at the time such restriction is imposed.

8. I also asked Mr. Stein what the restriction meant. Mr. Stein said he would have to do a little research. His response was understandable. According to his e-mail of the same day, his response will be delayed because there is litigation involved.

9. About one week ago, I visited Mr. Stein at his office to review the file on Subdivision Appl. No. 3707,

Ocean Drive West--Lot 25, Denham Approved May 5, 1998. The Planning Board Cerificate, as well as the conditions of said Certificate, granted to Mark Denham (Appl. No. 3707) are recorded in the City of Stamford's Land Records at Vol 4985 Pg 243-245. meeting,

10. During last week's meeting, I asked Mr. Stein, among other things, about the restrictions in the Mark Denham subdivision as set forth in paragraph 11 of the Planning Board Certificate. Mr. Stein advised me that the Planning Board has never required Stamford property owners to cut any existing plantings, to include bushes and trees, at the time when such restrictions are imposed.

11. Mr. Stein also advised me that the map number, which was not included in the Stamford Planning Board Certificate granted to Mark Denham, was 12924. Mr. Stein said it would be easier to get a copy of the Map from land records than for him to make a copy.

12. A true copy of the following documents are attached hereto in the Appendix:

(a) Mr. Stein's 1/2/03 e-mail to me, stating that the Affidavit must be reviewed by the Office of Legal Affairs before it can be released; and

(b) My 1/2/03 e-mail to Mr. Stein requesting an affidavit, as well as a draft affidavit.

Dated January 2, 2003

s/Karen A. Murphy
Karen A. Murphy

Sworn to before me and subscribed in my presence this 2nd day of January, 2003.

s/Joni Carter
Notary Public

COMMISSION
EXPIRATION:

MAYOR
LOINS A. CLAPES

PLANNING BOARD
Jon A. Smith, A.I.P.
Planning & Zoning Director

CITY OF STANFORD, CONNECTICUT 06901

June 14, 1978

Donald F. Zezima, Esq.
1516 Bedford Street
Stamford, Conn. 06905

Re: Subdivision #2977 DeLeo Bros. Development Corp.

Dear Mr. Zezima:

At its meeting held on Tuesday, June 13, 1978, the Planning Board approved the above captioned subdivision which you filed with this office on May 1, 1978 subject to the following conditions:

1) Approval is limited to four (4) lots as illustrated on a map dated April 25, 1978, entitled "Staff Alternate Plan", providing for parcels of approximately 24,750 sq. ft.; 52,600 sq. ft. with principal dwelling; 28,500 sq. ft:; and 15,000 sq. ft. with cottage/garage/greenhouse.

2) Lot 3 on said "Staff Alternate Plan" shall be subject to the further restriction that no accessory structures or view obstructions be placed in a triangular area 50 x 95 x 110 ft. at its southeasterly corner.

3) First floor elevations of dwellings to be constructed on Lots 1 and 3 of the "Staff Alternate Plan" shall be above elevation 11.9 feet above mean sea level USCGS Datum.

A certificate of approval has been filed with the Town Clerk and notice of approval will be published on Friday, June 16, 1978.

Upon submission of a final map to this office, said map can be signed for filing in The Stamford Land Records.

Very truly yours,

s/Jon A. Smith
Jon A. Smith
Planning & Zoning Director

CV 00 0180296 S	SUPERIOR COURT
KENNETH A. SCHWARTZ	JUDICIAL DISTRICT OF STAMFORD/NORWALK AT STAMFORD
VS.	
KAREN A. MURPHY and KATHLEEN A. MURPHY	August 12, 2003
	ORAL ARGUMENT REQUESTED

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO OBJECT TO THE PROPOSED ORDER CONTAINED IN THE NOTICE DATED JULY 14, 2003

The Defendants leaned for the first time, after reading the Plaintiff's Response, dated August 5, 2003, to Defendants Motion, dated July 14, 2003, ("Plaintiff Response") that the Plaintiff submitted to Judge Lewis an Order that allegedly sets forth the findings of the Appellate Court. The Defendants were not provided with, and have not received as of this date, a copy of the Plaintiff's Proposed Order. Furthermore, Plaintiff's counsel falsely states in the third

paragraph of Plaintiff's Response that" [t]he parties were given the right to submit Proposed Orders."

In Judge Lewis' May 12, 2003, order, which the Defendants' objected to on May 16, 2003, the Plaintiff, not the Defendants, was given the right to draft a Proposed Order. For some unknown reason, the Defendants' May 16, 2001, Motion was never heard. A copy of the Defendants' May 16, 2003 Motion was provided to Mr. Johnson, Plaintiff's counsel.

On June 9, 2003 the Defendants received a Notice, dated June 5,2003, concerning a "Proposed Order." The Defendants did not know what this was all about. The Defendants called and spoke with Judge Lewis' clerk, and wrote a fax[1], asking what this Notice was all about. Judge Lewis' clerk, David Price, responded that he did not know what Judge Lewis was referring to. It is now evident that unknown to the Defendants, and, notwithstanding Defendants' May 16 Objection, Plaintiff's counsel submitted a Proposed Order to Judge Lewis without providing the Defendants a copy. This is just another example of the

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[1] A copy of the June 9, 2003 facsimile is attached.

several ex-parte communications between Judge Lewis and Plaintiff's counsel in this case.

For Plaintiff's counsel to state in the last paragraph of Plaintiff's Response that "[t]he order sets forth a clear statement of the rights of the parties…" is outrages and is just another lie by Plaintiff's counsel."

In summary, not only justice, but also the misconduct of Plaintiff's counsel in this matter alone warrants a New Trial.

ORAL ARGUMENT REQUESTED

By s/Karen A. Murphy

Karen A. Murphy
Plaintiff Pro Se
68 Saddle Rock Road
Stamford, CT 06902
(203)-324-1423
(203)-324-9797

s/Kathleen A. Murphy

Kathleen A. Murphy
Plaintiff Pro Se
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(203)-324-1423
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RYAN, RYAN, JOHNSON & DELUCA, LLP
P. O Box 3057
Stamford, CT 06905
(203)357-9200
Fax: (203)357-7915

Date Sent: 08/20/03

From: J Paul Johnson

Please Deliver to: KAREN MURPHY

Fax# (203) 324-1614

Re: _____

File No: _____

Number of sheets sent, including cover, are 5

An operator can be contacted at (203) 357-9200 from 8:00 a.m. to 6:00 p.m. Eastern Time, if there are transmission problems.

Comments:

The information contained in this facsimile message is attorney/client privileged, and/or confidential or proprietary, or trade secret information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone at the above number, and return the original message to us at the above address by the U.S. Postal Service.

FOREROVAX

08-20-2003 10:48AM FROM-RYAN RYAN 2033577915 T-076 P.001/005 F-199
2033577915

CV-00-0180296S	SUPERIOR COURT
KENNETH A. SCHWARTZ	JUDICIAL DISTRICT OF STAMFORD/NORWALK
	AT STAMFORD
V.	
KAREN A. MURPHY and KATHLEEN A. MURPHY	June 2, 2003

PROPOSED ORDER

On August 30, 2001 this Court by Lewis, J., issued a Memorandum of Decision upholding the plaintiff's claim to a view easement over a portion of the defendants' property. The defendants appealed from this decision and on December 24, 2002 the Appellate Court entered a decision which affirmed this Court's decision upholding the plaintiffs claim to the view easement but reversed this Court's decision granting a mandatory injunction which ordered the defendants to maintain the view easement. The matter was remanded to this Court with an order that this Court dissolve the injunction and determine the rights and obligations of the parties with respect to the maintenance of the view easement in accordance with the December 24, 2002 opinion of the Appellate Court

NOW THEREFORE, it is ordered as follows:

1. That the mandatory injunction is hereby dissolved.

2. That the owner of the dominant estate (the plaintiff's property) shall have the right to maintain the view easement over the servient estate (the

defendants' property) at the sole cost and expense of the owner of the dominant estate in accordance with this order.

3. That the right to maintain the easement shall be carried out in a manner that is reasonably necessary to permit the enjoyment of the view easement and which will not unreasonably harm the existing hedge and tree.

4. That the right shall include the right to trim the hedge and other bushes in the view easement so that the hedge is kept at a height of approximately six (6) feet and to trim the Siberian elm tree located in the view easement so that it is kept at approximately the same shape and height as it was at the time of this court's August 30, 2001 decision.

5. That the owner of the dominant estate or his agents may enter onto the servient estate for the sole purpose of carrying out the work described above.

Dated this _____ day of June, 2003.

_____
The Court

CERTIFICATION

This is to certify that a copy of the foregoing PROPOSED ORDER was mailed on June 2, 2003 to all counsel and pro se parties of records:

Karen A. Murphy
68 Saddle Rock Road
Stamford, CT 06902
Pro Se Defendant

s/J. Paul Johnson
J. Paul Johnson

RYAN, RYAN, JOHNSON & DELUCA, LLP

ATTORNEYS AT LAW

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CATHERINE S. NIETZEL†
BEVERLY J. HUNT
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CYNTHIA A. DiPRETA*
JOHN B. GAFFNEY
ANTHONY D. SUTTON
DEIRDRE A. MURRAY
JOSEPH C. VALDES
JANE C. HAGERTY
JAMES J. NOONAN*
JOHN J. PEZZILLO*
ERIC W.F. NIEDERER
R. KELLEY FRANCO*
JEFFREY N. GAULL
JEFFREY C. HABLE*

OF COUNSEL
DANIEL E. RYAN, JR.
W. PATRICK RYAN
CHARLES H. McCAG

*ALSO ADMITTED IN NY

†CERTIFIED CIVIL TRIAL ADVOCATE-NATIONAL BOARD OF TRIAL ADVO

June 2, 2003

Stamford Superior Court
Clerk's Office
123 Hoyt Street
Stamford, CT 06905

Re: **Schwartz v. Murphy**
Docket #: **CV-00-0180296-S**

Dear Sir or Madam:

In accordance with the court's order, enclosed is a Proposed Order in connection with the above matter. A courtesy copy has been sent to Judge Lewis's clerk.

Sincerely,

J. Paul Johnson

JPJ:ac
Enclosure

03 10:49AM FROM-RYAN RYAN 2033577915 T-076 P.002/005 F-199

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TERM 2003

SUPERIOR COURT JUDICIAL DISTRICT OF
STAMFORD/NORWALK AT STAMFORD

C.V. 00-0180296-S

KENNETH A. SCHWARTZ

VS.

KAREN A. MURPHY AND KATHLEEN A. MURPHY

MOTION FOR RECTIFICATION OF THE SUPERIOR COURT MEMORANDUM OF DECISION AND FINAL JUDGEMENT, BOTH DATED OCTOBER 9, 2003

FOR THE DEFENDANTS KAREN A. MURPHY AND KATHLEEN A. MURPHY

Karen A. Murphy
Defendant Pro Se
68 Saddle Rock Road
Stamford, CT 06902

Kathleen A. Murphy
Defendant Pro Se
68 Saddle Rock Road
Stamford, CT 06902

MOTION FOR RECTIFICATION

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE APPELLATE COURT:

The defendants, Karen A. Murphy and Kathleen A. Murphy, appeal from a Memorandum of Decision filed by the Honorable William B. Lewis dated October 9, 2003 ("Memorandum"). On October 24, 2003, pursuant to § 63-4 of the Connecticut Practice Book Rules Of Appellate Procedure ("PB"), the defendants filed their appeal papers, which included the Judgement File dated October 9, 2003 and executed by Judge Lewis.

The defendants object to the form of the Judgement File because it does not fully comply with the Appellate Court's directive "to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." *Schwartz v Murphy*, 74 Conn. App. 286, 812 A.2d 87 (2002). ("Appellate Opinion"). In accordance with PB § 63-4(a)(6), defendants file this motion for rectification under PB § 66-5 seeking corrections to the Judgement File that

would bring it into full compliance with the Appellate Opinion.[1] Pursuant to PB § 66-5, the defendants also seek rectification to correct errors of fact contained in the Memorandum.

BRIEF HISTORY OF THE CASE

On September 15, 2000, plaintiff filed a complaint alleging that defendants' property is subject to a view easement in his favor and that the defendants have permitted a privet hedge and a large tree to remain in the easement area obstructing plaintiff's view of the Long Island Sound. The plaintiff asked the Trial Court for a mandatory injunction requiring the defendants to maintain "their privet hedge trimmed to not more than six feet in height along the easement area and to remove the tree existing in the easement area ...." In their answer filed October 10, 2000, the defendants denied plaintiff's material allegations, raised a number of special defenses and filed a counterclaim to determine the respective rights of the parties with respect to the view easement and to quiet title.

---

[1] On appeal, defendants intend to raise issues regarding the Trial Court's (i) execution of a Judgment File which did not fully comply with the Appellate Opinion; (ii) refusal to grant a new trial permitting the introduction of material new evidence; (iii) *de facto* "deed reformation" pertaining to defendants' property; and (iv) the misconduct of plaintiff's counsel and the Trial Court Judge.

In its Memorandum of Decision issued August 30, 2001, the Trial Court found that (i) a view easement exists over defendants' property; (ii) plaintiff may enforce the view easement; and (iii) the defendants are violating the view easement by permitting their hedge and tree to grow to a height that impinges on plaintiff's view of the Long Island Sound. The Trial Court granted a mandatory injunction in favor of the plaintiff, ordering the defendants to maintain the view easement in accordance with the Trial Court's specifications.[2]

On September 14, 2001, defendants' appealed to the Appellate Court and, on December 24, 2002, the Appellate Court issued its opinion, affirming, in part, and reversing, in part, the judgment of the Trial Court. *Schwartz v Murphy*, 74 Conn. App. 286, 812 A.2d 87 (2002). ("Appellate Opinion"). The Appellate Court ruled that (1) "the court properly determined that a view easement exists over a portion of the defendants' property for the benefit of the plaintiff's property as shown on map nos. 10716 and

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[2] The injunction stated that "the defendants shall keep their hedge and any other bushes in the area of the view easement to a height of not more than six feet, and shall also keep the tree trimmed and pruned so that it is reasonably similar in shape and height to the way it existed in September of 2000, when this law suit began." (Appellate Opinion; footnote 2).

12226" (*Id.*) and (2) "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement" (*Id.*). The case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (*Id.*). (emphasis added).

On January 3, 2003, the defendants filed a Motion for Reconsideration of the Appellate Opinion. The Appellate Court denied this motion on February 20, 2003. On March 10, 2003, the defendants filed a Petition for Certification to Appeal. The Supreme Court denied the petition on April 3, 2003.

The defendants received a Notice dated June 5, 2003 from Judge Lewis directing that "any comments by the defendants re: proposed order, should be directed to Judge Lewis in writing not later than June 23, 2003." (Notice not reflected in Docket Sheet). On June 9, 2003, defendants issued a facsimile transmission to Judge Lewis' clerk stating that they were unaware of any Proposed Order. (Facsimile not reflected in Docket Sheet). Judge Lewis'

clerk was unaware of any Proposed Order and could not answer defendants' questions.

The defendants received a Notice dated July 14, 2003 from the Court which contained a four paragraph Order drafted in response to the Appellate Opinion. (Notice not reflected in Docket Sheet). According to this Notice, Judge Lewis would sign this Order on August 1, 2003 "barring any objection." On July 23, 2003, the defendants filed their "Motion to Object to the Proposed Order Contained in the Notice Dated July 14, 2003" ("Defendants' Motion"). (Docket # 122). On August 5, 2003, the plaintiff filed his Response (Docket # 123.1) to Defendants' Motion and on August 12, 2003, the defendants' filed their Reply (Docket # 124) to plaintiff's Response, alleging, inter alia, ex-parte communications.

On October 9, 2003, Judge Lewis issued his Memorandum of Decision ("Memorandum") and accompanying Judgement File, which vacated and dissolved the mandatory injunction and determined some, but not all, of the respective rights and obligations of the parties with respect to the maintenance of the

view easement in accordance with the Appellate Opinion. The five component parts of the judgment are outlined below:

(1) The mandatory injunction relating to maintenance of the view easement is vacated and dissolved.

(2) The plaintiff, as owner of the dominant estate, has the right to maintain the view easement over the defendants' property at his sole cost and expense.

(3) The plaintiff's right to maintain the easement shall be performed in a manner that is reasonably necessary to permit the enjoyment of the view easement and which will not reasonably harm the existing hedge and elm tree.

(4) The plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet and to trim the elm tree so that it is maintained at approximately the same shape and height as shown in exhibits 12 and 13 submitted at the trial before this court.

(5) The plaintiff and his agents have the right to enter upon the defendants' property for the sole purpose of performing the trimming of the hedge, bushes and tree as described above, and only at reasonable times and not on weekends.

Judgement File; pp. 2-3. The defendants seek rectification of the Judgement File and respectfully request that the Trial Court (i) issue its determinations for the material rights issues omitted from the five component parts of the judgment, and (ii) correct the language contained in parts four and five of the judgment. The defendants also seek rectification to correct a material error of fact contained in the Memorandum.

SPECIFIC FACTS UPON WHICH THE MOVING PARTY RELIES

The defendants object to the Judgement File because it fails "to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (Appellate Opinion). The defendants object to the Memorandum because it contains a material error of fact. Prior to defendants' appeal, the Trial Court should rectify the material omissions and errors associated with the Judgement File, as well as correct the material error of fact contained in the Memorandum.

Material Omissions and Errors

The Judgment File fails to address, let alone determine, several material "rights and obligations" issues directly related to the maintenance of the view easement over defendants' property. Specifically, the Judgement File omits the deed reformation issues pertaining to defendants' deed, map nos. 10716 and 12226, the Dunaway-Contegni Agreement, and the Planning Board letter of June 14, 1978. As summarized by the Appellate Court:

> The defendants' deed indicates that their property is subject to, inter alia, the following restrictions: (1) "Restriction as to view obstruction and location of accessory structures affecting the southeasterly corner of the premises as shown on said map, 12226," (2) "Notations as shown on Maps numbered 10716 and 12226" and (3) Restrictive covenants and agreements set forth in a certain agreement between Faye Dunaway and john A. Contegni, et al., dated February 2, 1981 …."

Appellate Opinion. Defendants' respectfully request that the Trial Court rectify the Judgment File by specifically addressing the material reformation issues discussed below:

(1) **The deed reformation issues pertaining to defendants' deed, map nos. 10716 and 12226, the Dunaway-Contegni Agreement, and the Planning Board letter of June 14, 1978 are omitted from the Judgment File:** The Judgment

File should state that the defendants' deed, map nos. 10716 and 12226, and the Dunaway-Contegni agreement shall all be reformed in accordance with the terms and conditions set forth in the Memorandum (to include the view easement's location, the view easement's dimensions and the notations on the applicable maps) and that such reformation shall be binding on all parties, including the City of Stamford and all parties to the Dunaway-Contegni agreement.

(a) Discrepancies noted regarding view easement location: The Appellate Court recognized that there is a discrepancy about the precise location of the view easement over defendants' property, as differently described or depicted by (i) defendants' deed; (ii) map nos. 10716 and 12226; and (iii) the Dunaway-Contegni agreement. "There is a discrepancy … between the text of the restrictive covenant in the deed [of the defendants] and the survey maps incorporated into the deed with respect to the exact location of the easement on the defendants' property" (Appellate Opinion). The Appellate Court determined the location of the subject view easement. "Accordingly, we conclude that the correct location of the view easement on the defendants' property

is depicted in map nos. 10716 and 12226, i.e., the triangular area that abuts the portion of the plaintiff's property that is adjacent to Long Island Sound." (Appellate Opinion).

(b) <u>Discrepancies noted regarding view easement dimensions:</u> There is a discrepancy about the precise dimensions of the view easement over defendants' property, as differently described or depicted by (i) map nos. 10716 and 12226; and (ii) the Dunaway-Contegni agreement. There is no dispute about the fact that the plaintiff has no rights with respect to map nos. 10716 and 12226. Notwithstanding, the Memorandum establishes the dimensions of the easement based on map 12226 and not the Dunaway-Contegni agreement. Moreover, with respect to the precise dimensions of the view easement, the Memorandum incorrectly cites the Appellate Court Opinion as follows:

> In terms of the dimensions of the view easement over the defendants' property, the Appellate Court referred to Map. No. 12226 of the Stamford land records, which map contained a notation that the easement: "refers to a 50 foot by 100 foot by 110 triangular area located in the northeasterly corner of … the defendants' property."

Memorandum; p. 3. Map no. 12226 does not contain the above notation. The notation on map no. 12226 reads: "No accessory structures or view obstructions shall be placed in this area."

The Appellate Court states as a fact that:

> Map no. 12226 ... contains the following notation: "No accessory structures or view obstructions shall be placed in this area." That notation refers to a 50 foot by 100 foot by 110 foot triangular area located in the *northeasterly* corner of "Lot No. 3," which is now the defendants' property. (emphasis in original).

The Appellate Opinion did not determine the dimensions of the easement. In its Memorandum, the Trial Court, without citing any authority, selects the dimension as set forth on map 12226. (Memorandum; p. 3). A deed reformation is required no matter how the dimensions are ultimately determined. By omitting the deed reformation issue in the Memorandum, which issue is a fundamental principle of law, the Trial Court arbitrarily ignored the constitutional property rights of the defendants and other third parties.

(c) <u>Discrepancies noted regarding view easement notations:</u> The Appellate Opinion did not determine the appropriate notation for the view easement. Map no. 12226 contains the following notation: "No accessory structures or view

obstructions shall be placed in this area." As noted in the Appellate opinion, "[t]hat notation refers to a 50 foot by 100 foot by 110 foot triangular area located in the *northeasterly* corner of 'Lot No. 3,' which is now the defendants' property." The Dunaway-Contegni agreement contains the following notation: "No dwelling, accessory structure or view obstructions shall be located in the triangular area 50'x 95'x 110' at the Southwesterly corner of said premises [i.e., Lot No. 1; owned by a third party].

The above notations have been in place more than 20 years. Notwithstanding, the Trial Court has determined, without any testimony or evidence, that the plaintiff has an easement and that, among other things, a hedge (in existence for approximately 100 years) is to be kept at a height of six feet, and a tree (in existence more than 40 years) is to be trimmed so that it is kept at approximately the same shape and height as it is shown in exhibits twelve and thirteen (as submitted at trial). The Judgement File should reflect the material changes to the notations on map 12226 and in the Dunaway-Contegni agreement.

(2) <u>The Judgment File could be construed to mean that the plaintiff may cut defendants' hedge and bushes to a height</u>

below six feet: Part four of the judgment states, in relevant part, that "[t]he plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet ...." This determination of plaintiff's trimming rights could be construed to mean that he can trim the bushes to any height below the six foot maximum. The Judgment File should state that the plaintiff is permitted to trim the hedge and bushes to a height of not less than six feet.

(3) **The terms and conditions upon which the plaintiff may enter defendants' property for the sole purpose of maintaining the view easement are omitted from the Judgment File:** Part five of the judgment simply states that "[t]he plaintiff and his agents have the right to enter upon the defendants' property for the sole purpose of performing the trimming of the hedge, bushes and tree as described above, and only at reasonable times and not on weekends." (Judgment File; p. 3). In consideration of defendants' property rights and plaintiff's obligations with respect to same, the Judgment File should set forth the terms and conditions upon which the plaintiff may enter defendants' property for the sole purpose of maintaining the view easement. For

example, the defendants should be given at least a week's notice when Plaintiff intends to trim the bushes or hedges or tree, and a mutually convenient time should be scheduled to do the trimming.

(4) <u>The Memorandum incorrectly describes the "newly discovered relevant extrinsic evidence" detailed in Defendants' Motion:</u> The Trial Court incorrectly summarizes defendants' position as standing for the proposition that "this alleged newly discovered evidence [shows] that the view easement applies to some other person's property, but not to their property, and that the Planning Board of the city of Stamford did not impose a view easement over the defendants' property." (Memorandum; pp. 4-5). The Trial Court should rectify this inaccurate statement in the Memorandum. The defendants state that the "newly discovered relevant extrinsic evidence" shows that (i) Subdivision Appl. No. 3707 and Map No. 12924 is the source for the falsely alleged six foot height restriction for the subject hedge and bushes on defendants' property; (iii) the June 14th letter is the source of the restriction in the northeastern corner of defendants' property, and (iii) the Planning Board never required city of Stamford property

owners to cut existing plantings, to include bushes and trees, at the time when such restrictions are imposed.

As noted in Defendants' Motion, the "newly discovered relevant extrinsic evidence" referred to "statements made by Robin M. Stein, Jr., the Land Use Bureau Chief for the City of Stamford, in connection with (i) Subdivision Appl. No. 3707, Ocean Drive West--Lot 25, Denham Approved May 5, 1998; and (ii) the letter dated June 14, 1978 from the Planning Board of the City of Stamford." (Defendants' Motion; Docket # 122; p. 2).

These documents, together with Mr. Stein's statements, make it clear that (i) the alleged six foot requirement for, *inter alia*, the existing hedge on defendants' property actually applies to another neighbor's property, (ii) the restriction in the northeastern corner of defendants' property originates from the letter dated June 14, 1978 from the Planning Board of the City of Stamford, and (iii) the Planning Board has never required any party to remove, cut or trim any planting that existed in a restricted area at the time such restriction was imposed. The defendants' hedges and Siberian elm tree have existed long before the restrictions applicable to the northeast corner of defendants' property were imposed by the Planning Board.

In summary the "errors" ultimately deemed to be contained in defendants' deed, Planning Board records, map no. 12226, and the Dunaway-Contegni agreement are omitted from the Judgment File, but should be included because these "errors," all

determined by the Court, are fundamental to the respective view easement rights and obligations of the parties as described in defendants' deed, the Planning Board letter of June 14, 1978, and the Dunaway-Contegni agreement. If the trial court elects not to change its Memorandum in light of the above material errors, it should at least rectify the Judgement File in order to comply with the Memorandum by:

> **(i)** Ruling that defendants' deed, map nos. 10716 and 12226, the Dunaway-Contegni agreement, and the Planning Board letter of June 14, 1978 shall be reformed to reflect (i) one view easement in the northeastern corner of Defendants' property, (ii) the dimension of the view easement are as set forth on map no. 12226, and (iii) the notations reflected on map nos. 10716 and 12226, the Dunaway-Contegni agreement, and the Planning Board letter of June 14, 1978, in each case, are to be replaced by "the hedge and other bushes in the view easement area are kept at a height of six feet and the tree trimmed so that it is kept at approximately the same shape and height as it is shown in exhibit twelve and thirteen [as submitted at the trial before this court]." (Memorandum; p. 2).

(ii) Ruling that defendants' deed, map nos. 10716 and 12226, the Dunaway-Contegni agreement the Planning Board letter of June 14, 1978 shall all be reformed in accordance with the specific terms and conditions set forth in the Memorandum and that such reformation shall be binding on all parties, including the City of Stamford and parties to the Dunaway-Contegni agreement.

LEGAL GROUNDS UPON WHICH THE MOVING PARTY RELIES

In accordance with PB § 63-4(a)(6), defendants file this motion for rectification under PB § 66-5 seeking corrections to the Judgement File that would bring it into full compliance with the Memorandum of Decision, dated October 9, 2003. Pursuant to PB § 66-5, the defendants also seek rectification to correct the Trial Court's misstatements of the Appellate Court's findings.

WHEREFORE, for the reasons herein stated, the defendants respectfully move for the rectification requested in connection with the Memorandum and Final Judgement both dated October 9, 2003.

Dated at Stamford, Connecticut, this 1st day of November, 2003.

DEFENDANTS-APPELLANTS
KAREN A. MURPHY AND KATHLEEN A. MURPHY

By s/Karen A. Murphy
Karen A. Murphy
Defendant Pro Se
68 Saddle Rock Road
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s/Kathleen A. Murphy
Kathleen A. Murphy
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(203)-324-1423
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APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TERM 2003

SUPERIOR COURT JUDICIAL DISTRICT OF
STAMFORD/NORWALK AT STAMFORD

C.V. 02-0187359-S

KENNETH A. SCHWARTZ

VS.

KAREN A. MURPHY AND KATHLEEN A. MURPHY

MOTION FOR ARTICULATION OF THE SUPERIOR COURT
MEMORANDUM OF DECISION DATED OCTOBER 9, 2003

FOR THE DEFENDANTS KAREN A. MURPHY AND
KATHLEEN A. MURPHY

Karen A. Murphy
Defendant Pro Se
68 Saddle Rock Road
Stamford, CT 06902

Kathleen A. Murphy
Defendant Pro Se
68 Saddle Rock Road
Stamford, CT 06902

MOTION FOR ARTICULATION

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE APPELLATE COURT:

The defendants, Karen A. Murphy and Kathleen A. Murphy, appeal from a Memorandum of Decision filed by the Honorable William B. Lewis dated October 9, 2003 ("Memorandum"). On October 24, 2003, pursuant to § 63-4 of the Connecticut Practice Book Rules Of Appellate Procedure ("PB"), the defendants filed their appeal papers, which included the Judgement File dated October 9, 2003 and executed by Judge Lewis.

Pursuant to the provisions of PB § 66-5, defendants file this Motion for Articulation seeking an articulation of the Memorandum because it (i) fails to address issues that will be raised on appeal,[1] and (ii) is unclear or incomplete in setting forth the factual or legal basis for its decision.[2]

---

[1] *See* Defendants' Preliminary Statement Of The Issues, attached to defendants' appeal papers dated October 24, 2003.

[2] The Memorandum and Judgement File contain factual inaccuracies. Pursuant to PB § 66-5, the defendants also filed a Motion for Rectification in connection with the Memorandum and Judgement File.

BRIEF HISTORY OF THE CASE

On September 15, 2000, plaintiff filed a complaint alleging that defendants' property is subject to a view easement in his favor and that the defendants have permitted a privet hedge and a large tree to remain in the easement area obstructing plaintiff's view of the Long Island Sound. The plaintiff asked the Trial Court for a mandatory injunction requiring the defendants to maintain "their privet hedge trimmed to not more than six feet in height along the easement area and to remove the tree existing in the easement area ...." In their answer filed October 10, 2000, the defendants denied plaintiff's material allegations, raised a number of special defenses and filed a counterclaim to determine the respective rights of the parties with respect to the view easement and to quiet title.

In its Memorandum of Decision issued August 30, 2001, the Trial Court found that (i) a view easement exists over defendants' property; (ii) plaintiff may enforce the view easement; and (iii) the defendants are violating the view easement by permitting their hedge and tree to grow to a height that impinges on plaintiff's view of the Long Island Sound. The Trial Court

granted a mandatory injunction in favor of the plaintiff, ordering the defendants to maintain the view easement in accordance with the Trial Court's specifications.[3]

On September 14, 2001, defendants' appealed to the Appellate Court and, on December 24, 2002, the Appellate Court issued its opinion, affirming, in part, and reversing, in part, the judgment of the Trial Court. *Schwartz v Murphy*, 74 Conn. App. 286, 812 A.2d 87 (2002). ("Appellate Opinion"). The Appellate Court ruled that (1) "the court properly determined that a view easement exists over a portion of the defendants' property for the benefit of the plaintiff's property as shown on map nos. 10716 and 12226" (*Id.*) and (2) "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement" (*Id.*). The case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the

[3] The injunction stated that "the defendants shall keep their hedge and any other bushes in the area of the view easement to a height of not more than six feet, and shall also keep the tree trimmed and pruned so that it is reasonably similar in shape and height to the way it existed in September of 2000, when this law suit began." (Appellate Opinion; footnote 2).

view easement in accordance with this opinion." (*Id.*). (emphasis added).

On January 3, 2003, the defendants filed a Motion for Reconsideration of the Appellate Opinion. The Appellate Court denied this motion on February 20, 2003. On March 10, 2003, the defendants filed a Petition for Certification to Appeal. The Supreme Court denied the petition on April 3, 2003.

The defendants received a Notice dated June 5, 2003 from Judge Lewis directing that "any comments by the defendants re: proposed order, should be directed to Judge Lewis in writing not later than June 23, 2003." (Notice not reflected in Docket Sheet). On June 9, 2003, defendants issued a facsimile transmission to Judge Lewis' clerk stating that they were unaware of any Proposed Order. (Facsimile not reflected in Docket Sheet). Judge Lewis' clerk was unaware of any Proposed Order and could not answer defendants' questions.

The defendants received a Notice dated July 14, 2003 from the Court which contained a four paragraph Order drafted in response to the Appellate Opinion. (Notice not reflected in Docket Sheet). According to this Notice, Judge Lewis would sign this

Order on August 1, 2003 "barring any objection." On July 23, 2003, the defendants filed their "Motion to Object to the Proposed Order Contained in the Notice Dated July 14, 2003" ("Defendants' Motion"). (Docket # 122). On August 5, 2003, the plaintiff filed his Response (Docket # 123.1) to Defendants' Motion and on August 12, 2003, the defendants' filed their Reply (Docket # 124) to plaintiff's Response, alleging, *inter alia*, ex-parte communications.

On October 9, 2003, Judge Lewis issued his Memorandum of Decision ("Memorandum") and accompanying Judgement File, which vacated and dissolved the mandatory injunction and determined some, but not all, of the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with the Appellate Opinion.

SPECIFIC FACTS UPON WHICH THE MOVING PARTY RELIES

A. Relevant Extrinsic Evidence

The defendants respectfully seek an articulation from the Trial Court in connection with its reasoning for not reopening this matter or granting a "new trial" for the purpose of considering the

"newly discovered relevant extrinsic evidence." The Trial Court simply stated:

> This court declines to either reopen this matter or to grant a "new trial," as requested by the defendants, because all issues were fully litigated and this case is closed.

Memorandum; p. 5. In Defendants' Motion (Docket # 122), the defendants requested that the Court take notice of newly discovered evidence pertaining to a neighboring subdivision on the southeast side of plaintiff's property. The defendants state that the "newly discovered relevant extrinsic evidence" shows that (i) Subdivision Appl. No. 3707 and Map No. 12924 is the source for the falsely alleged six foot height restriction for the subject hedge and bushes on defendants' property; (ii) the June 14th letter is the source of the restriction in the northeastern corner of defendants' property, and (iii) the Planning Board never required city of Stamford property owners to cut existing plantings, to include bushes and trees, at the time when such restrictions are imposed.

Based on the facts set forth in Defendants' Motion, the Trial Court's explanation for not considering this new evidence is unclear or incomplete in setting forth the factual or legal basis for its decision. The Court's articulation should explain why the

"newly discovered relevant extrinsic evidence" does not rise to the level that would justify the Court to set aside the submission and reopen the case, or alternatively allow for a new trial. This relevant extrinsic evidence goes right to the heart of this matter.

As noted in Defendants' Motion, to promote justice by bringing all the facts before the Superior Court, the defendants requested that this Court set aside the submission and reopen the case to admit newly discovered "relevant extrinsic evidence" pertaining to, *inter alia*, the statements made by Robin M. Stein, Jr., the Land Use Bureau Chief for the City of Stamford, in connection with (i) Subdivision Appl. No. 3707, Ocean Drive West--Lot 25, Denham Approved May 5, 1998; and (ii) the letter dated June 14, 1978 from the Planning Board of the City of Stamford.

These documents, together with Mr. Stein's statements, make it clear that (i) the alleged six foot requirement for, *inter alia*, the existing hedge on defendants' property actually applies to another neighbor's property, (ii) the restriction in the northeastern corner of defendants' property originates from the letter dated June 14, 1978 from the Planning Board of the City of Stamford, and (iii)

the Planning Board has never required any party to remove, cut or trim any planting that existed in a restricted area at the time such restriction was imposed. The defendants' hedges and Siberian elm tree have existed long before the restrictions applicable to the northeast corner of defendants' property were imposed by the Planning Board.

The Memorandum makes a fleeting reference to the new evidence discussed in Defendants' Motion ("The defendants also claim that the case should be reopened 'to admit newly discovered relevant extrinsic evidence.'"), but the Trial Court refused to consider this evidence. Further, the Memorandum did not address defendants' statements in connection with the misconduct of plaintiff's counsel and the Trial Court Judge, as alleged in Defendants' Reply (Docket # 124).

The defendants respectfully seek an articulation from the Trial Court in connection with its reasoning for not reopening this matter or granting a "new trial" for the purpose of considering the "newly discovered relevant extrinsic evidence." The Memorandum is unclear or incomplete in setting forth the factual or legal basis for its decision on this issue.

B. Judicial and Attorney Misconduct

The defendants respectfully seek an articulation from the Trial Court in connection with why it refused to grant a new trial on the basis of plaintiff's counsel's misconduct and the misconduct of the Trial Judge, as alleged in Defendants' Reply. In defendants' Reply (Docket # 124) to plaintiff's Response (Docket # 123.1) to Defendants' Motion (Docket # 122), the defendants alleged, *inter alia*, ex-parte communications.

> The Defendants learned for the first time, after reading the Plaintiff's Response … that the Plaintiff submitted to Judge Lewis an Order that allegedly sets forth the findings of the Appellate Court. The Defendants were not provided with, and have not received as of this date, a copy of the Plaintiff's Proposed Order. Furthermore, Plaintiff's counsel falsely states in the third paragraph of Plaintiff's Response that "[t]he parties were given the right to submit Proposed Orders." …
>
> It is now evident that unknown to the Defendants, and, notwithstanding Defendants' May 16 [2003] Objection, Plaintiff's counsel submitted a Proposed Order to Judge Lewis without providing the Defendants a copy. This is just another example of the several ex-parte communications between Judge Lewis and Plaintiff's counsel in this case.

Defendants' Reply (Docket # 124); pp. 1-2. The Memorandum fails to address the issues of judicial and attorney misconduct which will be raised on appeal. The misconduct issues are outlined below:

(1) **Most recent misconduct:** Plaintiff's counsel and the Trial Court Judge engaged in ex-parte communications in connection with drafting the order in compliance with the Appellate Court's Opinion of December 24, 2002. Notwithstanding plaintiff's counsel June 2, 2003 letter to the Stamford Superior Court, the court records do not reflect, and the defendants did not receive, plaintiff's counsel Proposed Order, which was accepted by Judge Lewis. Even if one assumes the June 2nd letter was sent via U.S. mail, it was not sent to all pro se parties, and, to this date, defendants have not received a copy of the letter to Judge Lewis' clerk, if any, accompanying plaintiff's Proposed Order.

(2) **Trial and post-trial misconduct:** Plaintiff's counsel's misconduct also includes submitting into evidence, about one week after the trial ended, plaintiffs' Exhibit 16 (marked for identification) over defendants' counsel's objection, notwithstanding that, among other things, (a) the documents entered into evidence differed from those offered in plaintiff's Exhibit 16; (b) many documents were not in the file when reviewed by defendants for another earlier case; and some of the documents reviewed and previously copied by the defendants are no longer in the file, and (c) based on Planning Board procedures, anybody could insert or delete a document into

the file that was certified. In short, plaintiff's counsel introduced into evidence, and the Trial Court Judge admitted, non-authenticated evidence from a tampered file.

During the trial, the Trial Court Judge refused to read defendants' first Exhibit before excluding it from evidence. Moreover, plaintiff's complaint fails to state a claim and fails to plead a deed reformation.

(3) **Misconduct related to another case:** The same Trial Court Judge engaged in misconduct in another case involving the Murphys as plaintiffs. *Karen A. Murphy et al v. Zoning Board of Appeals of the City of Stamford et al.* On October 15, 2003, the Appellate Court issued an Order granting the Murphys' Motion for Review. The Order stated, in relevant part:

> "[T]he Motion for review is granted, and the relief requested is granted in part. The Trial Court is ordered to articulate only with respect to the plaintiffs' arguments that the alleged improper conduct of the defendants counsel and Judge Lewis constituted 'reasonable cause' for a new trial pursuant to General Statutes 52-270."

Because these judicial and attorney misconduct issues will be raised on appeal, and because the Memorandum fails to address these issues, an articulation by the Trial Court is needed. *See* Defendants' Preliminary Statement Of The Issues (attached to defendants' appeal papers dated October 24, 2003).

LEGAL GROUNDS UPON WHICH THE MOVING PARTY RELIES

The defendants rely on PB § 66-5 which states, in relevant part, "[a] motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable."

WHEREFORE, for the reasons herein stated, the defendants respectfully move for the articulation requested in connection with Judge Lewis' Memorandum of Decision dated October 9, 2003.

Dated at Stamford, Connecticut, this 1st day of November, 2003.

DEFENDANTS-APPELLANTS
KAREN A. MURPHY AND KATHLEEN A. MURPHY

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APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TERM 2003

SUPERIOR COURT JUDICIAL DISTRICT OF
STAMFORD/NORWALK AT STAMFORD

C.V. 00-0180296-S

KENNETH SCHWARTZ

VS.

KAREN A. MURPHY and KATHLEEN A. MURPHY

OPPOSITION TO MOTION TO TERMINATE STAY AND FOR COSTS (Filed together with Motion for Disqualification of Judicial Authority)

FOR DEFENDANTS KAREN A. MURPHY AND KATHLEEN A. MURPHY

Karen A. Murphy,
Defendant Pro Se
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Kathleen A. Murphy,
Defendant Pro Se
68 Saddle Rock Road
Stamford, CT

Dated: November 18, 2003

OPPOSITION TO MOTION TO TERMINATE STAY AND FOR COSTS

Plaintiff's one and one half page Motion To Terminate Stay And For Costs ("Motion"), brought pursuant to Connecticut Practice Book ("PB") Sections 61-11 (c) and (d), is without merit and should not be granted. Defendants' appeal has merit and is proceeding without any delay by the appellants. The Plaintiff is not faced with irreparable harm because of the stay, but the Defendants will suffer irreparable harm if the stay is terminated. There are no third parties to the proceeding that are adversely affected by the stay, but there are public policy concerns if the stay is terminated.

Prior to granting a motion terminating the automatic stay pursuant to PB § 61-11(a), the Court must determine and make a finding that the appeal was filed "only for delay", or "justice requires" the termination, as set forth in PB § 61-11(c). The motion must present the Court with sufficient facts to enable the Court to make a determination (finding). *See Labow v. Labow,* 170 Conn. 705 (1975); and *Cheshire v. Lewis,* No. AC 22706 (Conn. App. 04/01/2003). Plaintiff's Motion contains only conclusions and makes no attempt to provide the necessary factual support.

On October 24, 2003 the Defendants appealed from a Memorandum of Decision filed by Judge Lewis dated October 9, 2003 ("Memorandum"), which included the Judgement File dated October 9, 2003 executed by Judge Lewis. In connection with this appeal, the Defendants filed two motions on November 1, 2003, namely, (1) Motion for Rectification of the Superior Court Memorandum of Decision and Final Judgement, Both Dated October 9, 2003 ("Motion for Rectification"); and (2) Motion for Articulation of the Superior Court Memorandum of Decision Dated October 9, 2003 ("Motion for Articulation").[1] Plaintiffs Motion fails to mention, let alone address, the material facts and issues set forth in the aforementioned Motions for Articulation and Rectification.

FACTUAL BACKGROUND

On September 15, 2000, Plaintiff filed a complaint alleging that Defendants' property is subject to a view easement in his favor and that the Defendants have permitted a privet hedge and a large tree to remain in the easement area obstructing Plaintiffs view of the Long Island Sound. The Plaintiff asked the

[1]The Defendants also filed a Motion for Extension of Time to File Defendants' Appellate Brief, dated November 1, 2003. Defendants reasonably requested an extension for filing their appellate brief that extends to 30 days after receipt of Judge Lewis' response to the aforementioned motions for articulation and rectification.

Trial Court for a mandatory injunction requiring the Defendants to maintain "their privet hedge trimmed to not more than six feet in height along the easement area and to remove the tree existing in the easement area ...." In their answer filed October 10, 2000, the Defendants denied Plaintiffs material allegations, raised a number of special defenses and filed a counterclaim to determine the respective rights of the parties with respect to the view easement and to quiet title.

In its Memorandum of Decision issued August 30, 2001, the Trial Court found that (i) a view easement exists over Defendants' property; (ii) Plaintiff may enforce the view easement; and (iii) the Defendants are violating the view easement by permitting their hedge and tree to grow to a height that impinges on Plaintiffs view of the Long Island Sound. The Trial Court granted a mandatory injunction in favor of the Plaintiff, ordering the Defendants to maintain the view easement in accordance with the Trial Court's specifications. [2]

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[2] The injunction stated that "the defendants shall keep their hedge and any other bushes in the area of the view easement to a height of not more than six feet, and shall also keep the tree trimmed and pruned so that it is reasonably similar in shape and

On September 14, 2001, Defendants' appealed to the Appellate Court and, on December 24, 2002, the Appellate Court issued its opinion, affirming, in part, and reversing, in part, the judgment of the Trial Court. *Schwartz v Murphy,* 74 Conn. App. 286, 812 A.2d 87 (2002). ("Appellate Opinion"). The Appellate Court ruled that (1) "the court properly determined that a view easement exists over a portion of the defendants' property for the benefit of the plaintiff s property as shown on map nos. 10716 and 12226" (Id.) and (2) "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiffs view easement" (Id.). The case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (Id.). (emphasis added).

On January 3, 2003, the Defendants filed, based on, inter alia, new evidence, a Motion for Reconsideration of the Appellate Opinion. The Appellate Court denied this motion on February 20,

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height to the way it existed in September of 2000, when this law suit began." (Appellate Opinion; footnote 2).

2003. On March 10, 2003, the defendants filed a Petition for Certification to Appeal. The Supreme Court denied the petition on April 3, 2003.

On May 12, 2003, Judge Lewis issued an order that "[t]he Plaintiff is to Draft a Judgement File. "(Order not reflected in Docket Sheet). On May 16, 2003 Defendants filed a Motion to Reconsider Order dated May 12, 2003. (Docket # 121). This Motion was never ruled on, and the Plaintiff did not submit an objection to this Motion.

The Defendants received a Notice dated June 5, 2003 from Judge Lewis directing that "any comments by the defendants re: proposed order, should be directed to Judge Lewis in writing not later than June 23, 2003." (Notice not reflected in Docket Sheet). On June 9, 2003, Defendants issued a facsimile transmission to Judge Lewis' clerk stating that they were unaware of any Proposed Order. (Facsimile not reflected in Docket Sheet). Judge Lewis' clerk was unaware of any Proposed Order and could not answer Defendants' questions. [3]

[3] See Docket # 124 for a copy of this facsimile.

The Defendants received a Notice dated July 14, 2003 from the Court which contained a four paragraph Order, and made no mention that the Plaintiff submitted a draft order which was accepted verbatim by the court. (Notice not reflected in Docket Sheet). According to this Notice, Judge Lewis would sign this Order on August 1, 2003 "barring any *objection."* On July 23, 2003, the defendants filed their "Motion to Object to the Proposed Order Contained in the Notice Dated July 14, 2003," and requested a new trial based on new evidence. ("Defendants' Motion"). (Docket # 122). On August 5, 2003, the plaintiff filed his Response (Docket # 123.1) to Defendants' Motion and on August 12, 2003, the defendants' filed their Reply (Docket # 124) to plaintiffs Response, alleging, *inter alia, ex parte communications.* On August 20, 2003 the Defendants' received via facsimile a copy of Plaintiff's counsel's communication to Judge Lewis, dated June 2, 2003, which is not reflected on the Docket, and if it was served, it was improperly served. (see Exhibits A and B)[44]

On October 9, 2003, Judge Lewis issued his Memorandum of Decision ("Memorandum") and accompanying

[4] Note: Plaintiff's Draft Order (see Exhibit A)is identical to Judge Lewis' July 14, 2003 Proposed Order, which is at Exhibit B. Also according to the Certification (see Exhibit A) only one of the Defendants was allegedly served.

Judgement File. On October 24, 2003, the Defendants filed an appeal. In connection with the appeal, the Defendants filed, on November 1, 2003: (1) Motion for Rectification of the Superior Court Memorandum of Decision and Final Judgement, Both Dated October 9, 2003 ("Motion for Rectification"); (2) Motion for Articulation of the Superior Court Memorandum of Decision Dated October 9, 2003 ("Motion for Articulation"); and (3) Motion for Extension of Time to File Defendants' Appellate Brief.

The Plaintiff filed a one and a half page Motion to Terminate Stay and for Costs dated November 4, 2003.[5] The Defendants filed with the Appellate Court an Opposition To Motion To Terminate Stay And For Costs and a Motion for Disqualification of Judicial Authority, both dated November 18, 2003 ("Motion for Disqualification").

DISCUSSION

The Plaintiff filed this baseless one and one-half page Motion after the Defendants filed their Motions for Articulation and Rectification on November 1, 2003, not immediately after the Defendants filed their appeal on October 24, 2003. Defendants

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[5] If the Plaintiff filed the Motion with the Superior Court, as the papers received by the Defendants suggest, it is an invalid Motion

request that, by reference herein, all of the facts and issues set forth in Defendants' Motion for Articulation (see Exhibit C, Motion for Rectification (see Exhibit D), and Motion for Disqualification be incorporated in this Opposition To Motion To Terminate Stay And For Costs.

To grant Plaintiff s Motion pursuant to PB § 61-11(a), the Court must determine and make a finding that the appeal was filed "only for delay", or "justice requires" the termination, as set forth in PB § 61-11(c). Further, the Motion must be deemed to have provided the Court with sufficient facts to enable the Court to make a determination. *See Labow v. Labow* and *Cheshire v. Lewis, supra.* Plaintiff's Motion contains only conclusions and makes no attempt to provide the necessary factual support.

There is no evidence in the record to support the conclusory allegation that Defendants filed their appeal "only for delay." The record in this case shows that the Defendants have exercised their rights appropriately and in a timely fashion, while the Trial Judge and Plaintiff's counsel have steadfastly avoided the material issues (e.g., new evidence, various deed reformation issues, ex -parte communications) raised by the Defendants.

There is no evidence in the record to support the conclusory allegation that "justice requires" the termination of the

stay. "Principles pertinent to the due administration of justice include: (1) the likelihood that the defendant will prevail on appeal (2) the irreparability of the injury to be suffered from the execution of the judgment; (3) the effect of the stay upon the other parties to the proceedings; and (4) the public interest involved." (Internal quotation marks omitted.) Pospisil v. Pospisil, 1999 Conn. Super. LEXIS 459, Superior Court, judicial district of Tolland at Rockville, Docket No. 054011 (February 26, 1999, Zarella, J.).

In connection with the first principle, there is a reasonable likelihood that the Defendants will prevail in their appeal. Judge Lewis' Memorandum and Final Judgement, both dated October 9, 2003, do not, among other things, comply with the Appellate Opinion. *See* also Defendants' (i) Motion for Articulation; (ii) Motion for Rectification; and (iii) Motion for Disqualification. Further, the Plaintiff has not introduced any evidence to support the notion that Defendants' appeal is frivolous. An action is frivolous "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or

reversal of existing law." *Texaco, Inc. v.Golart,* 206 Conn. 454, 464, 538 A.2d 1017 (1988).

With respect to the second principle, the Defendants will suffer irreparable harm if the stay is terminated, that is, the imminent loss of property rights. On the other hand, there is no evidence to support the conclusion that the Plaintiff will suffer irreparable harm if the stay is not terminated. Regarding the third principle, there are no third parties to the proceeding that are adversely affected by the stay.

The fourth principle, the public interest involved, also favors the Defendants. There are public policy concerns at issue in this case which pertain to, *inter alia, (i)* the rights of property owners in the city of Stamford, and (ii) judicial and attorney misconduct. If the stay is terminated on the basis of Plaintiffs one and one half page Motion, the public interest would be materially harmed, impugning the integrity of the judiciary of the State of Connecticut.

Because all four of the above principles weigh in favor of the Defendants, the due administration of justice does not require that the stay be terminated.

Finally, with regard to the gratuitous and tertiary allegations against one of the pro se Defendants, the Plaintiff and his counsel cite no facts in support of their outrageous conclusions.[6] In this case, the Defendants' papers have always been grounded in fact and law. The Plaintiff, on the other hand, submits this Motion without a whit of fact or case law to support his position.

CONCLUSION

For the reasons above, Plaintiff s one and one half page Motion is without merit and should not be granted.

The Defendants also point out that they are pursuing the property rights issues in this case, not just to protect their own interests, but for a fair and impartial judiciary that benefits all the people who reside in the city of Stamford, not just a select group.

THE MURPHY DEFENDANTS

By s/Karen A. Murphy
Karen A. Murphy
Defendant Pro Se

s/Kathleen A. Murphy
Kathleen A. Murphy
Defendant Pro Se

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[6] The Defendants have suffered considerable damages in defending this case. For example, Karen A. Murphy's business has been adversely affected by this litigation. Her business has incurred substantial opportunity losses as a direct result of this litigation. adversely affected by the stay.

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APPELLATE COURT

OF THE STATE OF CONNECTICUT

TERM 2003

SUPERIOR COURT JUDICIAL DISTRICT OF
STAMFORD/NORWALK AT STAMFORD

C.V. 00-0180296-S

KENNETH A. SCHWARTZ

VS.

KAREN A. MURPHY AND KATHLEEN A. MURPHY

Motion for Disqualification of Judicial Authority (Filed with Opposition To Motion To Terminate Stay And For Costs)

FOR THE DEFENDANTS KAREN A. MURPHY AND
KATHLEEN A. MURPHY

Karen A. Murphy,
Defendant Pro Se
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Kathleen A. Murphy,
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Dated: November 17, 2003

MOTION FOR DISQUALIFICATION OF JUDICIAL AUTHORITY

Pursuant to Connecticut Practice Book ("PB") section 1-23, this motion seeks to disqualify the Honorable William B. Lewis under Canon 3(c)(1)(A) from presiding in Plaintiffs Motion to Terminate Stay and for Costs dated November 4, 2003, and in any further in this matter. [1]

PB § 1-22 provides, in part, that "[a] judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Canon 3(c) of the Code of Judicial Conduct ...." Canon 3(c)(1)(A) states, in relevant part, as follows:

> A judge should disqualify himself ... in a proceeding in which the judge's

[1] The Defendants have appealed from a Memorandum of Decision filed by Judge Lewis dated October 9, 2003 ("Memorandum"). On October 24, 2003, the Defendants filed their appeal papers, which included the Judgement File dated October 9, 2003 and executed by Judge Lewis. In connection with this appeal, the Defendants filed, on November 1, 2003: (1) Motion for Rectification of the Superior Court Memorandum of Decision and Final Judgement, Both Dated October 9, 2003 ("Motion for Rectification"); (2) Motion for Articulation of the Superior Court Memorandum of Decision Dated October 9, 2003 ("Motion for Articulation"); and (3) Motion for Extension of Time to File Defendants' Appellate Brief. The Plaintiff filed a Motion To Terminate Stay and for Costs dated November 4, 2003. If the Plaintiff filed the Motion with the Superior Court, as the papers received by the Defendants suggest, it is an invalid Motion.

> impartiality might reasonably be questioned, including ... where ... the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

As evidenced by the facts set forth in the accompanying affidavit by Karen A. Murphy ("Murphy Aff."), and in the Opposition To Motion To Terminate Stay And For Costs and Motions for Articulation and Rectification, all of which are incorporated into this Motion, Judge Lewis has (i) has a personal bias or prejudice concerning the Defendants and (ii) has engaged in a series of ex party communications with Plaintiff s counsel in violation of Canon 3(a)(4).[2] These ex party communications, which have materially prejudiced the rights of the Defendants, pertain to substantive matters or issues on the merits and raise reasonable questions about Judge Lewis' impartiality.

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[2] Canon 3(a)(4) states, in part, as follows:

> A judge should accord to every person who is legally interested in a proceeding ... full right to be heard under the law. A judge shall not initiate, permit or consider ex parte communications, or consider other communications made to a judge outside the presence of the parties concerning a pending or impending proceeding except that …

Disqualification under Canon 3(c)(1) is justified if, on the basis of the judge's conduct, a reasonable person might question the judge's impartiality.

> "'Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the Judge's "impartiality might reasonably be questioned" is a basis for the Judge's disqualification. Thus, an impropriety or the appearance of impropriety ... that would reasonably lead one to question the Judge's impartiality in a given proceeding clearly falls within the scope of the general standard ....' *Thode, Reporter's Notes to Code of Judicial Conduct* (1973), pp. 60-61. 'The question is not whether the Judge is impartial in fact. It is simply whether another, not knowing whether or not the Judge is actually impartial, might reasonably question his [or her] impartiality, on the basis of all of the circumstances.' *Rice v. McKenzie,* 581 F.2d 1114, 1116 (4th Cir. 1978); see *Spires v. Hearst Corporation,* 420 F. Sup. 304, 307 (D. Cal. 1976)." *Papa v. New Haven Federation of Teachers* (supra) 745-46.

Dubaldo v. Dubaldo, 14 Conn. App. 645, 542 A.2d 750 (1988).

The questions presented here are (i) whether Judge Lewis could render impartial decisions going forward, and (ii) whether his *ex parte* communications with Defendants'

counsel during and after the trial created the appearance of impropriety. "Proof of actual bias is not required for disqualification. *Dacey v. Connecticut Bar Assn.,* 184 Conn. 21, 29, 441 A.2d 49 (1981) ...." (Id.). *See* also *Ford v. Ford,* 52 Conn. App. 522, 727 A.2d 254 (1999). [D]isqualification of a trial Judge is not dependent on proof of actual bias. The appearance and the existence of impartiality are both essential elements of a fair trial.").

The Defendants have consistently brought the aforementioned bias and *ex parte* communications to the attention of Judge Lewis, but to no avail. Most recently, Judge Lewis' Memorandum of Decision, and Judgement File, both dated October 9, 2003 failed to address (i) the Defendants' rights and (ii) the misconduct issues (i.e., *ex parte* communications) raised by the Defendants in their Reply (Docket # 124) to Plaintiffs Response (Docket # 123.1) to Defendants' Motion to Object to the Proposed Order (Docket # 122). *(See* Murphy Aff.). *See* Defendants' Motion for Rectification and Motion for Articulation, both filed on November 1, 2003. Based on Judge Lewis' consistent failure to address the Defendants' rights and the misconduct issues set forth in the accompanying Murphy Affidavit and

Motions Rectification and Articulation, any reasonably would inferred that Judge Lewis' has a personal bias or prejudice against the Defendants.

The Defendants' respectfully request that Judge Lewis disqualify himself from Plaintiff s Motion to Terminate Stay and for Costs dated November 4, 2003, and all future matters relating to this case. The facts relied upon to show the grounds for the requested disqualification are set forth in the accompanying affidavit, Opposition To Motion To Terminate Stay And For Costs and Motions for Articulation and Rectification of Judge Lewis' Memorandum of Decision and Final Judgement, both dated October 9, 2003. Similarly, the accompanying Certificate of Karen A. Murphy, Defendant Pro Se, attests that this motion is made in good faith.

THE DEFENDANTS

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AFFIDAVIT OF KAREN A. MURPHY IN SUPPORT OF MOTION FOR DISQUALIFICATION OF JUDICIAL AUTHORITY

I, Karen A. Murphy, state that I am a resident of the City of Stamford within the State of Connecticut and a member of the bar of the State of New York. I am one of the pro se Defendants in this matter and make the following statements of my own personal knowledge. Any reference to "we" or "our" refers to the Defendants.

(1) This affidavit sets forth the factual basis in support of the Motion For Disqualification Of Judicial Authority filed by Karen A. Murphy and Kathleen A. Murphy, the pro se Defendants, dated November 17, 2003.

(2) On December 24, 2002, the Appellate Court issued its opinion ("Appellate Opinion") in this matter, ruling, in part, that "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiffs view easement." The case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties

with respect to the maintenance of the view easement in accordance with this opinion."

***Ex Parte* Communications (Proposed Order)**

(3) We received a Notice dated June 5, 2003 from Judge Lewis directing that "any comments by the defendants re: proposed order, should be directed to Judge Lewis in writing not later than June 23, 2003." This Notice is not reflected in the Docket Sheet.

(4) On June 9, 2003, I issued a facsimile transmission to David Price, Judge Lewis' clerk, stating that we were unaware of any Proposed Order. This facsimile is not reflected in the Docket Sheet. During a subsequent telephone call, Mr. Price advised me that he was unaware of any Proposed Order and could not answer my questions concerning the Proposed Order.

(5) The Defendants received a Notice dated July 14, 2003 from the Court which contained a four paragraph Order drafted in response to the Appellate Opinion. This Notice is not reflected in the Docket Sheet. According to this Notice, Judge Lewis would sign this Order on August 1, 2003 "barring any objection."

(6) On July 23, 2003, the Defendants filed their "Motion to Object to the Proposed Order Contained in the Notice Dated July 14, 2003" ("Defendants' Motion"). (Docket # 122).

(7) On August 5, 2003, the Plaintiff filed his Response (Docket # 123.1) to Defendants' Motion which stated, in part, that "[t]he plaintiff submitted an order which sets forth the findings of the Appellate Court and this Court set forth its proposed order and gave the parties until August 1, 2003 to comment."

(8) On August 12, 2003, the Defendants' filed their Reply (Docket # 124) to Plaintiff s Response, alleging, among other things, ex parte communications. On pages 1-2 of our Reply, we stated, in part:

> The Defendants learned for the first time, after reading the Plaintiffs Response ... that the Plaintiff submitted to Judge Lewis an Order that allegedly sets forth the findings of the Appellate Court. The Defendants were not provided with, and have not received as of this date, a copy of the Plaintiffs Proposed Order. Furthermore, Plaintiffs counsel falsely states in the third paragraph of Plaintiffs Response that "[t]he parties were given the right to submit Proposed Orders." ...
>
> It is now evident that unknown to the Defendants, and, notwithstanding Defendants' May 16 [2003] Objection, Plaintiffs counsel submitted a Proposed Order to Judge Lewis without providing the Defendants a copy. This is

just another example of the several ex-parte communications between Judge Lewis and Plaintiffs counsel in this case.

(9) On August 20, 2003, Plaintiffs counsel sent a facsimile transmission to me which contained copies of Defendants' counsel's letter dated June 2, 2003 to the Stamford Superior Court Clerk's Office which stated, in part, "enclosed is a Proposed Order in connection with the above matter. A courtesy copy has been sent to Judge Lewis' clerk." This June 2"d letter does not show Defendants as receiving a copy. Prior to the August 20, 2003 facsimile, the Defendants never received copies of Plaintiffs Proposed Order or letter of June 2, 2003, nor are these documents reflected on the Docket. Further, if these documents were sent as alleged, it was an invalid certification since all pro se parties are not reflected on the certification. Recall that the Defendants had an outstanding Motion, dated May 16, 2003 (Docket 4 121) objecting to Plaintiff submitting a proposed order, which Motion was never ruled on. The Plaintiffs Proposed Order enclosed with the Plaintiffs letter of June 2, 2003 is the same as the Order contained in the Court's Notice dated July 14, 2003.

(10) On October 9, 2003, Judge Lewis issued his Memorandum of Decision ("Memorandum") and

accompanying Judgement File. Despite the Appellate Court's directive to "determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion," the Memorandum did not address, among other things, (i) the various deed reformation issues consistently raised by the Defendants in connection with their property, and (ii) the issues raised by the Defendants in connection with judicial and attorney misconduct.

(11) The Defendants have appealed from a Memorandum of Decision filed by Judge Lewis dated October 9, 2003 ("Memorandum"). On October 24, 2003, the Defendants filed their appeal papers, which included the Judgement File dated October 9, 2003 and executed by Judge Lewis. In connection with this appeal, the Defendants filed, on November 1, 2003, (1) a Motion for Rectification of the Superior Court Memorandum of Decision and Final Judgement, Both Dated October 9, 2003 ("Motion for Rectification"); and (2) a Motion for Articulation of the Superior Court Memorandum of Decision Dated October 9, 2003 ("Motion for Articulation").

(12) On the basis of the Memorandum's material omissions and errors, as set forth in detail in the Motion for Articulation and Rectification, any reasonable person would infer that Judge Lewis was personally biased against the Defendants.

Ex Parte Communications and Bias (During and After Trial)

(13) Judge Lewis permitted Plaintiffs counsel to submit into evidence, about one week after the trial ended, Plaintiffs' Exhibit 16 (marked for identification) over Defendants' counsel's objection, notwithstanding that, among other things, (a) the documents entered into evidence after the trial differed from those offered in Plaintiff's Exhibit 16 introduced at the trial; (b) many documents were not in the file when reviewed by Defendants for another earlier case; and some of the documents reviewed and previously copied by the Defendants are no longer in the file, and (c) based on Planning Board procedures, anybody could insert or delete a document into the file that was certified.

(14) During the trial, Judge Lewis refused to even read Defendants' first Exhibit before excluding it from evidence.

On the basis of Judge Lewis' decision to admit into evidence and to consider Plaintiff s Exhibit 16, an ex parte communication, while excluding our first Exhibit without even reading the document, Judge Lewis' impartiality would reasonably be questioned.

Judicial Misconduct (Another Case)

(15) In a separate case (Karen A. Murphy et al v. Zoning Board of Appeals of the City of Stamford et al.), we have also alleged that Judge Lewis engaged in judicial misconduct at our expense. On October 15, 2003, the Appellate Court issued an Order granting our Motion for Review. The Order stated, in relevant part:

> "[T]he Motion for review is granted, and the relief requested is granted in part. The Trial Court is ordered to articulate only with respect to the plaintiffs' arguments that the alleged improper conduct of the defendants counsel and Judge Lewis constituted 'reasonable cause' for a new trial pursuant to General Statutes 52-270."

THE MURPHY DEFENDANTS

By:s/Karen A. Murphy s/Kathleen A. Murphy

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(203)-324-1423
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ORDER

The foregoing "Motion For Disqualification of Judicial Authority" dated November 17, 2003 having been presented is hereby GRANTED/DENIED.

THE COURT

by:_____

CERTIFICATE OF THE PRO SE PARTIES OF RECORD

There is no counsel of record for Defendants Pro Se in this matter. Karen A. Murphy, Defendant Pro Se, therefore, in lieu of submitting the Certificate Of The Counsel Of Record, does hereby attest, under oath, that Defendants' Pro Se Motion For Disqualification of Judicial Authority has been prepared and submitted in good faith.

By: s/Karen A. Murphy

Karen A. Murphy, Defendant Pro Se
68 Saddle Rock Road
Stamford, Connecticut
(203)-324-1423
(203)-324-9797

Subscribed and sworn to and before me this 17th day of November 2003

s/Gerry Molina

NOTARY PUBLIC
MY COMMISSION EXPIRES MAR. 31, 2007

CV 00-0180296 S | SUPERIOR COURT

KENNETH A. SCHWARTZ, | J.D. OF STAMFORD/NORWALK

Plaintiff

V.

KAREN A. MURPHY, ET AL | AT STAMFORD

Defendant | NOVEMBER 21, 2003

REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO TERMINATE STAY AND FOR COSTS

BACKGROUND

The Defendants have filed a motion entitled "Opposition to Motion to Terminate Stay and for Costs" which is dated November 18, 2003. This was in response to Plaintiff's motion dated November 4, 2003. The essence of Defendants' objection is that the Court has not as yet ruled on a Motion for Articulation and Motion for Rectification, also filed on November 4, 2003.

DISCUSSION

In these Motions, the Defendants raise no new issues which should prevent this Court from lifting the automatic stay based, at least, on the "justice requires" provision of section 61-11(c) of the Practice Book. The Defendants' motions do not dispute the basic fact that the Appellate Court has upheld the

Plaintiff's right to a view easement over a portion of the Defendants' property and the Plaintiff's right, at his cost, to effectuate same by trimming the hedge in question to six feet along the border of the Plaintiff's and the Defendants' properties as shown on Maps 10716 and 12226 as filed on the Stamford Land Records. This is all that the Plaintiff requests to do pending final resolution of the matter and, as stated, this right is no longer in dispute.

The Defendants request the Court to modify the judgment to address certain issues involving more precise delineation of the easement areas, to reform the deeds in question so that the land records are clarified, to require additional notifications, and to clarify whether or not the hedge can be trimmed below six feet. These issues will be heard in due time, but they need not be decided before the Plaintiff is allowed to trim the hedge to a six foot level as stated above.

The Defendants further contend that they will suffer irrevocable harm if the stay is lifted. How they are irrevocably harmed by the Plaintiff taking those actions which have been adjudicated at the Appellate level has not been addressed. On the other hand, for the

past three years the Plaintiff has been irrevocably harmed and continues to be so harmed every day that he is denied his rights to the view easement. Time lost cannot be replaced.

The Defendants also request a new trial based on alleged "new evidence." This "new evidence" was brought to the attention of the Appellate Court in Defendants Motion for Reconsideration dated January 3, 2003. The Appellate Court denied that Motion on February 20, 2003, effectively ruling that this "new evidence" has no bearing on the case at hand. In addition, the Supreme Court had notice of the "new evidence" but denied Defendants Petition for Certification to Appeal on April 3, 2003.

The Defendants scandalous allegations of judicial and attorney misconduct were also raised in their Motion for Reconsideration. Again, both the Appellate Court and the Supreme Court gave no credence to these claims. The Plaintiff reiterates that the Defendant, Karen Murphy, is a New York attorney who should not be permitted to impugn the integrity of the Courts of the State of Connecticut without reprimand.

The Defendants also seek to make much of the fact that the Plaintiff's Motion for Stay runs for only one and one half pages. Sometimes a matter is so clear that brevity is called for.

CONCLUSION

In conclusion, the Plaintiff requests that the automatic stay be lifted so that he can exercise the rights which have been granted to him by the Courts of the State of Connecticut.

By s/J. Paul Johnson
J. PAUL Johnson
Attorney for Plaintiff Kenneth A. Schwartz
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APPELLATE COURT
OF THE
STATE OF CONNECTICUT

TERM 2004

SUPERIOR COURT
JUDICIAL DISTRICT OF STAMFORD/NORWALK AT
STAMFORD

APPELLATE COURT NO.: A.C. 24754

KENNETH SCHWARTZ
Plaintiff Appellee
VS.

KAREN A. MURPHY and KATHLEEN A. MURPHY
Defendants Appellants

MOTION FOR REVIEW OF THE SUPERIOR COURT'S "MEMORANDUM RE: ARTICULATION/TERMINATION" DATED MAY 27, 2004, WHICH, *INTER ALIA*, DENIED DEFENDANTS' MOTIONS FOR ARTICULATION AND RECTIFICATION

FOR DEFENDANTS APPELLANTS

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Kathleen A. Murphy
Defendant Pro Se
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MOTION FOR REVIEW

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE APPELLATE COURT:

Pursuant to Connecticut Practice Book ("PB") § 66-7, Karen A. Murphy and Kathleen A. Murphy, the Defendants-Appellants ("Defendants") file this Motion For Review with the Appellate Court because they are aggrieved by the actions of the Trail Judge, the Honorable William B. Lewis, in connection with his "Memorandum Re: Articulation / Termination" filed on May 27, 2004 ("Memorandum") (R.A. 178),[1] which denied the Defendants' (1) Motion for Rectification of the Superior Court Memorandum of Decision and Final Judgement, Both Dated October 9, 2003 (R.A. 85); and (2) Motion for Articulation of the Superior Court Memorandum of Decision Dated October 9, 2003 (R.A. 98).[2] These two motions were filed on November 1, 2003 for

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[1] Cites to the record "Appendix To Defendants-Appellants' Motions For Review Of The Superior Court's [Memorandum], which denied Defendants' Motions For Articulation And Rectification And Granted Plaintiff's Motion To Terminate Stay" will be as (R.A. x).

[2] The Memorandum also granted Plaintiff's "Motion To Terminate Stay And For Costs" (R.A. 108). Along with this Motion For

the purpose of clarifying the legal issues on appeal (R.A. 83) and correcting the facts in the appeal record.

BRIEF HISTORY OF THE CASE

On October 24, 2003, the Defendants filed their appeal from Judge Lewis' October 9, 2003 Memorandum (R.A. 75) and Judgement File (R.A. 80) because both documents failed to comply with the Appellate Court's directive (R.A. 10) in *Schwartz v Murphy*, 74 Conn. App. 286, 812 A.2d 87 (2002) ("Appellate Opinion") (AC 22318),[3] which stated that the case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (R.A. 17). (emphasis added).

The 2003 Memorandum and Judgement File vacated and dissolved the mandatory injunction relating to the maintenance of

---

Review, the Defendants filed a separate Motion For Review on June 4, 2004, pursuant to PB §§ 61-14 and 66-6, in connection with being aggrieved by the Trial Court's granting of Plaintiff's Motion To Terminate.

[3] This Court ruled that (1) "the court properly determined that a view easement exists over a portion of the defendants' property for the benefit of the plaintiff's property as shown on map nos. 10716 and 12226" (R.A. 15) and (2) "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement" (R.A. 16).

the view easement over the Defendants' property, but did not determine all of the respective rights and obligations of the parties with respect to the maintenance of the view easement. In an effort to clarify the legal issues on appeal and correct the facts in the appeal record, and pursuant to PB § 66-5, the Defendants filed their Motions For Rectification (R.A. 85) and Articulation (R.A. 98). The Plaintiff did not file a reply to these two motions pursuant to PB § 66-5.

On May 27, 2004, Judge Lewis issued his Memorandum (R.A. 178) which, among other things, denied the Defendants' separate Motions for Rectification and Articulation.

SPECIFIC FACTS UPON WHICH THE MOVING PARTY RELIES

In his Memorandum (R.A. 178), Judge Lewis simply states that "[t]his court denies the defendants' motion for articulation or rectification of its memorandum of decision dated October 9, 2003, because all the issues in this controversy about the view easement were fully litigated and this case is over and finished" (R.A. 179) and "[t]hey have had their day in court." (R.A. 181). The record in

this matter clearly shows that all the issues in this controversy about the view easement have not been fully litigated.[4]

Even the Plaintiff concedes that all of the material issues relating to the Defendants' rights and obligations in connection with the view easement have not been fully litigated. The Plaintiff, for example, admits that the Defendants are entitled to have their deed reformation issues heard.[5] (R.A. 171).

The Motion For Rectification identified several material omissions and errors pertaining to the Memorandum and Judgement File. For example, the Memorandum and Judgement File did not discuss the deed reformation issues pertaining to Defendants' deed (R.A 182), Map Nos. 10716 and 12226 (R.A. 184), the Dunaway-Contegni Agreement (R.A. 185), and the Planning Board letter of June 14, 1978 (R.A. 61). These deed

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[4] The Defendants had no intent to revisit the trial issues in this matter. Based on Judge Lewis' reasoning for the denial of the motions, the Defendants are compelled, as evidenced by the facts summarized in Exhibit A attached hereto, to show that the issues have not been fairly litigated and the Defendants have not had a day in court with due process.

[5] The Plaintiff recognizes that "[t]hese issues [more precise delineation of the easement area, to reform the deeds in question so that the land records are clarified, to require additional notifications, and to clarify whether or not the hedge can be trimmed below six feet] will be heard in due time …." (R.A. 172).

reformation issues relate directly to the Defendants' rights and obligations with respect to the maintenance of the view easement and, as such, the Memorandum and Judgement File should have also addressed the following material reformation issue questions left open by the Appellate Court (R.A. 10) and which have not been addressed by the Trial Court:

(1) Did the Trial Court's decision eliminate two easements (i.e., one in the southeast corner of Defendants' property, as stated in, *inter alia*, the Planning Board letter of June 14, 1978 (R.A. 61) and Defendants' deed (R.A. 182); and the one on the southwestern corner of a third party's property, as stated in the unpled Dunaway-Contegni Agreement (R.A. 185)).

(2) Did the Trial Court decision subject the Defendants' property to two easements (i.e., one in the northeast corner of the property as pled (R.A. 4) and as shown on the applicable maps (R.A. 184), and one in the southeast corner of the property as noted above).

(3) Are the dimensions of the view easement as shown on the applicable maps (R.A. 184) or as stated in the Dunaway-Contegni Agreement (R.A. 185), and what is the basis for this decision.

(4) Are the notations on the relevant maps and the Dunaway-Contegni Agreement, which have been in place more than 20 years, to be changed to reflect Judge Lewis' determination that the "plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet and to trim the elm tree so that it is maintained at approximately the same height as shown in exhibits 12 and 13 ...." (R.A. 81-82). And, if so, what is the authority for these reformations.

Further, the Motion For Rectification identified a material error (*see* R.A. 93-94) in the Memorandum whereby Judge Lewis incorrectly describes the "newly discovered relevant extrinsic evidence" detailed in Defendants' "Motion to Object to the Proposed Order Contained in the Notice Dated July 14, 2003" ("Defendants' Motion") (R.A. 41).

The Trial Court incorrectly summarizes Defendants' position as standing for the proposition that "this alleged newly discovered evidence [shows] that the view easement applies to some other person's property, but not to their property, and that the Planning Board of the city of Stamford did not impose a view easement over the defendants' property." (R.A. 78-79). The

Defendants stated, in Defendants' Motion (*see* R.A. 42-44), that the "newly discovered relevant extrinsic evidence" shows that:

> **(1)** Subdivision Appl. No. 3707 and Map No. 12924 is the source for the falsely alleged six foot height restriction for the subject hedge and bushes on defendants' property;
>
> **(2)** The June 14, 1978 letter is the source of the restriction in the northeastern corner of Defendants' property; and
>
> **(3)** The Planning Board never required city of Stamford property owners to cut existing plantings, to include bushes and trees, at the time when such restrictions are imposed.

This relevant extrinsic evidence contains documents (R.A. 52-55) which show that the falsely alleged six foot height restriction for Defendants' hedge (R.A. 4; para. 5) actually applies to a third party's property. Further, anticipated testimony in connection with the June 14, 1978 letter (R.A. 61), which describes the view easement in the southeast corner of Defendants' property, will show that the letter was the actual source of the view easement in the northeast corner of Defendants' property.

The Defendants' request to admit this relevant extrinsic evidence is an attempt to (i) authenticate the June 14, 1978 letter,

which was entered into evidence by the Plaintiff after the trial as an *ex parte* communication; and (ii) identify by judicial notice[6] the source of the admittedly falsely alleged six foot height restriction. (R.A. 7-8). This relevant extrinsic evidence supports the Appellate Court's "scrivener's" error theory and provides the facts necessary to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement.

In order to comply with the Appellate Court's directive to "determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion" (R.A. 17), an articulation about the relevant extrinsic evidence and the allegations of judicial and attorney misconduct is necessary.

LEGAL GROUNDS UPON WHICH THE MOVING PARTY RELIES

The Defendants rely on PB § 66-7 which states, in relevant part: "Any party aggrieved by the action of the trial judge as regards rectification of the appeal or articulation under Section 66-

[6] The Defendants respectfully request that this Court take judicial notice of Subdivision Appl. No. 3707 (R.A. 52) and Map No. 12924 (R.A. 55).

5 may, within ten days of the issuance of notice of the order sought to be reviewed, make a written motion for review to the court, to be filed with the appellate clerk, and the court may, upon such a motion, direct any action it deems proper."

CONCLUSION

WHEREFORE, for the reasons herein stated, and in order to perfect the record on appeal, the Defendants respectfully move this Court for an Order reversing that portion of Judge Lewis' Memorandum dated May 27, 2004 that denied Defendants' separate Motions For Rectification and Articulation, both dated November 1, 2003.

Specifically, the Defendants request this Court to direct the Trial Judge to address the open deed reformation issues affecting the Defendants' property rights, to rectify his Memorandum so as to correctly describe what is labeled the "newly discovered relevant extrinsic evidence," and to address the alleged misconduct issues.

Dated at Stamford, Connecticut, this 4th day of June, 2004.

THE DEFENDANTS-APPELLANTS
KAREN A. MURPHY AND KATHLEEN A. MURPHY

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EXHIBIT A

Judge Lewis denied Defendants' Motions for Articulation and Rectification "because all of the issues in this controversy were fully litigated and this case is over and finished" (R.A. 179) and "[t]hey have had their day in court." (R.A. 181). As shown below, the issues have not been fairly litigated and Defendants have not had a day in court with due process.

(1) It is undisputed that the Trial Court's decisions in this matter (to include the recent decision granting Plaintiff's Motion To Terminate the Stay) were rendered in violation of Defendants' fundamental state and federal constitutional protections because of the undisputed facts pertaining to (i) *ex parte* communications; (ii) evidence tampering; (iii) the introduction of unauthenticated evidence into the record after the one day bench trial on March 1, 2001; and (iv) the Trial Court's misconduct in effecting a *de facto* reformation of Defendants' deed, not in accordance with the law, but by use of footnotes and theories of "typographical" and "scrivener's" errors with not a scintilla of testimonial evidence and no notice or opportunity for the Defendants and other third parties to be heard on this deed reformation.

(2) The Appellate Court denied the Defendants an opportunity to have the above material issues heard before a court of law when, after nearly all the misconduct occurred after the one day bench trial on March 1, 2001, it (i) first denied Defendants' Motion For Review dated December 19, 2001, which was a request to expand the appeal record in connection with the facts relating to their material issues,[7] and

[7] The material issues included claims about (i) *ex parte* communications; (ii) the improper admission of Plaintiff's non-authenticated evidence one week after the trial; and (iii) the failure

then in the Appellate Opinion (ii) dismissed Defendants' material issues in a footnote (R.A. 17; fn 1). Plaintiff's counsel believes that he had been exonerated by this footnote and has continued to conduct *ex parte* communications when the case was remanded back to the Trial Court. (R.A. 65-66).

(3) Both the Appellate Court and the Trial Court agree that Plaintiff's Complaint fails to state a claim, and that the Plaintiff did not plead a reformation of the multi-party, Dunaway-Contegni Agreement. Notwithstanding, if a new trial is not granted, the Appellate Court and the Trial Court reformed, in an unclear manner, the multi-party Dunaway-Contegni Agreement,[8] the Defendants' deed, and Map No. 12226 (R.A. 184). Because there was no legal basis for a reformation, the disguised, unclear reformation was accomplished through the use of footnotes and other tactics. This reformation, which was enacted without any testimony, extrinsic evidence, or an opportunity for the Defendants or other third parties to be heard, violates all principles of law. Recall that the Plaintiff did no discovery, engaged no experts, and Plaintiff's counsel called no witness other than the Plaintiff. This case involves, *inter alia*, *ex parte* communications, non-authenticated evidence entered into the record after the trial, tampered evidence, false statements to the court by Plaintiff's counsel, and the Trial Judge excluding Defendants' documentary evidence without even reading same. These undisputed facts are well documented.

This case demonstrates that when fundamental legal principles are ignored, erroneous decisions are made and injustices

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of the Plaintiff to request and argue in his Trial Brief for permission to amend his Complaint. The Complaint has not been amended as of this date.

[8] With regard to the Dunaway-Contegni Agreement, Plaintiff denied in another case that he was even bound by its terms.

occur. Examples of the fundamental legal principles ignored in this case include:

(A) A plaintiff may not allege one cause of action and recover upon another. Plaintiff's pleadings have not been amended to add the unpled Dunaway-Contegni Agreement. Even Plaintiff's attorney admits that the pleadings must be amended.

(B) A deed reformation must be specifically pled or it will not be adjudicated. Plaintiff failed to plead a deed reformation. As a result, there was absolutely no discovery regarding the intentions of the parties to the multi-party, Dunaway-Contegni Agreement included in the record, yet the 2003 Memorandum and Judgement File reforms the agreement without any discovery by, or notice to, any of the parties to the agreement. Further, the standard of proof for a deed reformation is considerable.

(C) *Ex parte* communication raises a rebuttable presumption of prejudice. Once a party shows an improper *ex parte* communication has occurred, the burden of showing that the communication was harmless shifts to the party seeking to uphold the validity of the decision. The Defendants are harmed because the 2003 Memorandum and Judgement File omitted any reference to the June 14, 1978 letter, apparently in a effort to avoid the *ex parte* communications issues and the tampering with evidence issues associated with Plaintiff's Exhibit 16. Plaintiff's counsel continued to have *ex parte* communications when the case was remanded.

(D) The 2003 Memorandum and Judgement File have added more confusion to an already complex matter by denying Defendants and other third parties the opportunity to be heard with respect to introducing "relevant extrinsic evidence" about, *inter alia*, key Planning Board documents and the Dunaway-Contegni Agreement. Further, without evidence from Defendants and other third parties, the Trial Court reformed, in an unclear manner, the Dunaway-Contegni Agreement, the Defendants' deed, and Map No. 12226

(dimensions and notations). It is now unclear what easements exists, which affects not only the Defendants' property, but also other third parties' property.

If the omitted undisputed material facts and law set forth above were clearly set forth and analyzed in the Trial Court's Memorandum (R.A. 178), in all likelihood the opinion would be substantially different, and there would be no need for this, or the prior, appeal.

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TERM 2004

SUPERIOR COURT JUDICIAL DISTRICT OF
STAMFORD/NORWALK AT STAMFORD

APPELLATE COURT NO.: A.C. 24754

KENNETH SCHWARTZ

Plaintiff Appellee

VS.

KAREN A. MURPHY and KATHLEEN A. MURPHY

Defendants Appellants

MOTION FOR REVIEW OF THE SUPERIOR COURT'S DECISION TO GRANT PLAINTIFF'S "MOTION TO TERMINATE STAY AND FOR COSTS" WITHOUT CONDUCTING A HEARING PURSUANT TO PRACTICE BOOK § 61-11(c)

FOR DEFENDANTS APPELLANTS

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Kathleen A. Murphy,
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MOTION FOR REVIEW

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE APPELLATE COURT:

Pursuant to Connecticut Practice Book ("PB") §§ 61-14 and 66-6, Karen A. Murphy and Kathleen A. Murphy, the Defendants-Appellants ("Defendants"), file this Motion For Review with the Appellate Court because they are aggrieved by the actions of the Trail Judge, the Honorable William B. Lewis, in connection with his "Memorandum Re: Articulation/Termination" filed on May 27, 2004 ("Memorandum"), which, among other things, terminated the automatic stay in place pursuant to PB § 61-11(a) while an appeal challenging the correctness of an earlier decision of Judge Lewis is pending. A copy of the Memorandum is attached to the "Appendix To Defendants-Appellants' Motions For Review Of The Superior Court's [Memorandum], which denied Defendants' Motions For Articulation And Rectification And Granted Plaintiff's Motion To Terminate Stay" at A 178.[1]

[1] Cites to the record Appendix will be as (R.A. x).

The Memorandum granted Plaintiff's "Motion To Terminate Stay And For Costs" (R.A. 108) dated November 4, 2003 despite the fact that (i) no hearing was conducted as required pursuant to PB § 61-11(c); and (ii) the Memorandum does not satisfy the requirements of PB § 64-1, as required by PB § 61-14.[2]

PB § 64-1 provides that the Trial Court's decision shall encompass its conclusions as to each claim of law raised by the parties and the factual basis therefor. Judge Lewis' conclusory allegations (R.A. 180) that the Defendants filed their appeal "only for delay" or that "justice requires" the termination of the stay does not satisfy the standard set forth in PB § 64-1, or due process. There is no dispute that Judge Lewis failed to conduct a hearing before granting Plaintiff's Motion To Terminate. Further, the Plaintiff has not set forth any facts in support of his Motion.

BRIEF HISTORY OF THE CASE

On September 15, 2000, Plaintiff filed a Complaint (R.A. 4) alleging that Defendants' property is subject to a view easement

[2] The Memorandum also denied Defendants' Motions for Articulation (R.A. 98) and Rectification (R.A. 85). Along with this Motion For Review, the Defendants filed a separate Motion For Review on June 4, 2004, pursuant to PB § 66-7, in connection with being aggrieved by the Trial Court's denial of their Motions for Articulation and Rectification.

in his favor and that the Defendants have permitted a privet hedge and a large tree to remain in the easement area obstructing Plaintiff's view of the Long Island Sound. The Plaintiff asked the Trial Court for a "mandatory injunction requiring the defendants at all times keep their hedges trimmed at six feet or below." (R.A. 6). In their answer filed October 10, 2000, the Defendants denied Plaintiff's material allegations, raised a number of special defenses and filed a counterclaim to determine the respective rights of the parties with respect to the view easement and to quiet title.

In its Memorandum of Decision issued August 30, 2001 (R.A. 19), the Trial Court found that (i) a view easement exists over Defendants' property; (ii) Plaintiff may enforce the view easement; and (iii) the Defendants are violating the view easement by permitting their hedge and tree to grow to a height that impinges on Plaintiff's view of the Sound. The Trial Court granted a mandatory injunction in favor of the Plaintiff, ordering the Defendants to maintain the view easement in accordance with the Trial Court's specifications.[3]

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[3] The injunction stated that "the defendants shall keep their hedge and any other bushes in the area of the view easement to a height of not more than six feet, and shall also keep the tree trimmed and

On September 14, 2001, Defendants' appealed to the Appellate Court and, on December 24, 2002, the Appellate Court issued its opinion (R.A. 10), affirming, in part, and reversing, in part, the judgment of the Trial Court. *Schwartz v Murphy*, 74 Conn. App. 286, 812 A.2d 87 (2002). ("Appellate Opinion"). The Appellate Court ruled that (1) "the court properly determined that a view easement exists over a portion of the defendants' property for the benefit of the plaintiff's property as shown on map nos. 10716 and 12226" (R.A. 15) and (2) "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement" (R.A. 16). The case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (R.A. 17). (emphasis added).

On January 3, 2003, the Defendants filed, based on, *inter alia*, new evidence, a Motion for Reconsideration of the Appellate Opinion. The Appellate Court denied this motion on February 20,

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pruned so that it is reasonably similar in shape and height to the way it existed in September of 2000, when this law suit began." (R.A. 28).

2003. On March 10, 2003, the Defendants filed a Petition for Certification to Appeal. The Supreme Court denied the petition on April 3, 2003.

On May 12, 2003, Judge Lewis issued an order (R.A. 31) that "[t]he Plaintiff is to Draft a Judgement File." (Order not reflected in Docket Sheet). On May 16, 2003, Defendants filed a Motion to Reconsider Order dated May 12, 2003 (R.A. 32). This Motion was never on the short calendar and the Plaintiff did not submit an objection to this Motion. This Reconsideration Motion was never ruled on.

The Defendants received a Notice dated June 5, 2003 (R.A. 37) from Judge Lewis directing that "any comments by the defendants re: proposed order, should be directed to Judge Lewis in writing not later than June 23, 2003." (Notice not reflected in Docket Sheet). On June 9, 2003, Defendants issued a facsimile transmission (R.A. 36) to Judge Lewis' clerk stating that they were unaware of any Proposed Order. (Facsimile not reflected in Docket Sheet). Judge Lewis' clerk was unaware of any Proposed Order and could not answer Defendants' questions.

The Defendants received a 3-page Notice dated July 14, 2003 (R.A. 38) from the Court which contained a five paragraph Order, which made no mention that the Plaintiff submitted a draft order. (Notice not reflected in Docket Sheet). According to this Notice, Judge Lewis would sign this Order on August 1, 2003 "barring any objection." On July 23, 2003, the Defendants filed their "Motion to Object to the Proposed Order Contained in the Notice Dated July 14, 2003" ("Defendants' Motion") (R.A. 41). On August 5, 2003, the Plaintiff filed his Response (R.A. 62) to Defendants' Motion and on August 12, 2003, the Defendants' filed their Reply (R.A. 65) to Plaintiff's Response, alleging, *inter alia*, *ex-parte* communications.

On October 9, 2003, Judge Lewis issued his Memorandum (R.A. 75) and Judgement File (R.A. 80). On October 24, 2003, the Defendants filed their appeal papers (*see* Preliminary Statement of Issues at R.A. 83). On November 1, 2003, in connection with the appeal, the Defendants filed their Motions For Rectification (R.A. 85) and Articulation (R.A. 98).

On November 4, 2003, the Plaintiff filed his "Motion To Terminate Stay And For Costs"[4] (R.A. 108). On November 16, 2003, the Defendants filed two motions with the Appellate Court, namely, (i) Defendants' Opposition To Plaintiff's Motion To terminate Stay And For Costs (R.A. 119); and (ii) a Motion for Disqualification of Judicial Authority (R.A. 160).[5] The Plaintiff filed his Reply (R.A. 171) to the Murphy Opposition on November 21, 2003, which, unlike Judge Lewis, recognized that the Defendants are entitled to have their deed reformation issues heard.[6]

On May 27, 2004, Judge Lewis issued his Memorandum (R.A. 178) which granted Plaintiff's Motion To Terminate Stay And For Costs (R.A. 108) without a hearing and denied the Defendants' separate Motions for Articulation (R.A 98) and Rectification (R.A 85).

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[4] Pursuant to the directions of the appellate Court, Plaintiff filed the motion with the Superior Court on December 3, 2003.

[5] Pursuant to the directions of the appellate Court, the Motion for Disqualification was filed with the Superior Court on December 10, 2003.

[6] The Plaintiff recognizes that "[t]hese issues [more precise delineation of the easement area, to reform the deeds in question so that the land records are clarified, to require additional notifications, and to clarify whether or not the hedge can be trimmed below six feet] will be heard in due time ...." (R.A. 172).

SPECIFIC FACTS UPON WHICH THE MOVING PARTY RELIES

Without any basis in fact, the Plaintiff filed his one and a half page "Motion To Terminate Stay And For Costs" (R.A. 108) on November 4, 2003, after the Defendants filed their separate Motions for Articulation (R.A. 98) and Rectification (R.A. 85) on November 1, 2003, not immediately after the Defendants filed their appeal on October 24, 2003.

Plaintiff's Motion To Terminate contained no facts to support the conclusion that the Defendants had filed their appeal "only for delay." In Plaintiff's Reply to the Murphy Opposition, Plaintiff argues, for the first time, without citing any law, that the "justice requires" provision of PB § 61-11(c) applies. In contrast, the Murphy Opposition contained a detailed delineation of the facts and law that needed to be addressed before a court terminates a stay pursuant PB §61-11(c). Notwithstanding, Judge Lewis' Memorandum granted the Plaintiff's Motion by simply citing PB §61-11(c). Further, Judge Lewis granted the Plaintiff's Motion without holding a hearing on the matter. (R.A. 180).

Defendants request that, by reference herein, all of the facts and issues set forth in Defendants' Motion for Articulation, Motion for Rectification, and Motion for Disqualification (R.A. 160) be incorporated in this Motion For Review.

LEGAL GROUNDS UPON WHICH THE MOVING PARTY RELIES

(1) ***The Court must conduct a hearing before issuing an order terminating a stay pursuant to PB § 61-11(c).***

PB § 61-11(a) provides the basic automatic stay of execution guideline for the trial court once an appeal has been filed in the case. PB § 61-11(a) states, in relevant part, as follows:

> Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order appealed from shall be automatically stayed until the time to take an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause.

PB § 61-11(c) provides a mechanism whereby the Trial Court may only terminate the automatic stay after a hearing, upon motion or *sua sponte*, "[i]f the judge who tried the case is of the opinion that ... the appeal is taken, only for delay or ... the due administration of justice so requires ...." The Trial Court failed to conduct a hearing in connection with the Plaintiff's Motion To

Terminate, but went ahead and terminated the stay in direct violation of PB § 61-11(c). This flagrant disregard for the rule of law is another example of Judge Lewis' bias toward the Defendants.

The Defendants are entitled to the full and unhampered exercise of their appellate rights in accordance with the applicable rules of practice or statutes. The Defendants have been deprived of this right, and so, were deprived of due process of law. *Hartford National Bank & Trust Co. v. Tucker*, 181 Conn. 296, 298, 435 A.2d 350, cert. denied, 449 U.S. 956, 101 S. Ct. 363, 66 L.Ed.2d 221 (1980).

(2) ***There is no evidence in the record to support Judge Lewis' conclusory allegations that the Defendants filed their appeal "only for delay" or that "justice requires" the termination of the stay. Further, the Memorandum does not satisfy the requirements of PB § 64-1, as required by PB § 61-14***

There is no evidence in the record to support the conclusion that the Defendants filed their appeal "only for delay" or that "justice requires" the termination of the stay. (R.A 180). As noted in the Murphy Opposition, the Plaintiff's "Motion must be deemed to have provided the Court with sufficient facts to enable

the Court to make a determination." (R.A. 120). *See Labow v. Labow*, 170 Conn. 705 (1975); and *Cheshire v. Lewis*, No. AC 22706 (Conn. App. 2003). The Plaintiff's one and a half page Motion (R.A. 108) contains only conclusions and makes no attempt to provide the necessary factual support.

The record here shows that the Defendants have exercised their rights appropriately and in a timely fashion, while the Trial Judge and Plaintiff's counsel have steadfastly avoided the material issues (e.g., new evidence, various deed reformation issues, *ex-parte* communications) raised by the Defendants.

There is no evidence in the record to support the conclusory allegation that "justice requires" the termination of the stay. "Principles pertinent to the due administration of justice include: (1) the likelihood that the defendant will prevail on appeal; (2) the irreparability of the injury to be suffered from the execution of the judgment; (3) the effect of the stay upon the other parties to the proceedings; and (4) the public interest involved." (Internal quotation marks omitted.) *Pospisil v. Pospisil*, 1999 Conn. Super. LEXIS 459, Superior Court, judicial district of

Tolland at Rockville, Docket No. 054011 (February 26, 1999, *Zarella, J.*).

In connection with the first principle, there is a reasonable likelihood that the Defendants will prevail in their appeal. Judge Lewis' 2003 Memorandum (R.A. 75) and Judgement File (R.A. 80) do not, among other things, comply with the Appellate Court's direction "to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion."[7] (R.A. 17). Further, the Plaintiff has not introduced any evidence to support the notion that Defendants' appeal is frivolous. An action is frivolous "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." *Texaco, Inc. v. Golart*, 206 Conn. 454, 464, 538 A.2d 1017 (1988).

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[7] *See* also Defendants' (i) Motion for Articulation (R.A. 98); (ii) Motion for Rectification (R.A. 85); and (iii) Motion for Disqualification (R.A. 160).

With respect to the second principle, the Defendants will suffer irreparable harm if the stay is terminated, that is, the imminent loss of property rights. On the other hand, there is no evidence to support the conclusion that the Plaintiff will suffer irreparable harm if the stay is not terminated. Regarding the third principle, there are no third parties to the proceeding that are adversely affected by the stay.

The fourth principle, the public interest involved, also favors the Defendants. There are public policy concerns at issue in this case which pertain to, *inter alia*, (i) the rights of property owners in the city of Stamford, and (ii) judicial and attorney misconduct. If the stay is terminated on the basis of Plaintiff's one and one half page Motion, the public interest would be materially harmed, impugning the integrity of the judiciary of the State of Connecticut. Because all four of the above principles weigh in favor of the Defendants, the due administration of justice mandates that the stay not be terminated.

Finally, Judge Lewis' Memorandum (R.A. 75) does not satisfy the requirements of PB § 64-1, as required by PB § 61-14, which states in relevant part:

The sole remedy of any party desiring to review an order concerning a stay of execution shall be by motion for review under Section 66-6. Execution of an order of the court terminating a stay of execution shall be delayed for ten days from the issuance of notice of the order, and if a motion for review is filed within that period, the order shall be stayed pending decision of the motion, unless the court having appellate jurisdiction rules otherwise. ... A ruling concerning a stay is a judgment in a trial to the court for purposes of Section 64-1, and the trial court making such a ruling shall state its decision ... in accordance with the requirements of that section. (emphasis added).

Judge Lewis' Memorandum does not encompass its conclusions as to each claim of law raised by the Defendants and the factual basis therefor. In fact, the Memorandum fails to note or address any of the law or the facts raised in the Murphy Opposition (R.A. 119).

CONCLUSION

WHEREFORE, for the reasons herein stated, the Defendants respectfully move this Court for an Order reversing that portion of Judge Lewis' Memorandum dated May 27, 2004 that granted Plaintiff's Motion To Terminate Stay And For Costs" dated November 4, 2003, and that costs be awarded to the Defendants in connection with this motion.

Dated at Stamford, Connecticut, this 4th day of June, 2004.

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APPELLATE COURT
OF THE
STATE OF CONNECTICUT

TERM 2004

SUPERIOR COURT JUDICIAL DISTRICT OF
STAMFORD/NORWALK AT STAMFORD

APPELLATE COURT NO.: A.C. 24754

KENNETH SCHWARTZ

Plaintiff Appellee

VS.

KAREN A. MURPHY and KATHLEEN A. MURPHY

Defendants Appellants

MOTION FOR RECONSIDERATION *EN BANC*

FOR DEFENDANTS APPELLANTS

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MOTION FOR RECONSIDERATION *EN BANC*

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE APPELLATE COURT:

GROUNDS FOR RECONSIDERATION AND WHY RECONSIDERATION *EN BANC* IS NECESSARY

Pursuant to Connecticut Practice Book ("PB") § 71-5, the Defendants Appellants file this Motion For Reconsideration *En Banc* on the grounds that the Appellate Court Order dated July 13, 2004 (R.A. 223),[1] which granted that portion of Plaintiff's "motion requesting dismissal of the appeal as frivolous:"

> **(1)** Conflicts with the Practice Book in that (i) the Defendants were never granted a hearing before the imposition of any sanction as required by PB § 85-3; and (ii) the Plaintiff never filed the requisite Motion to Dismiss the appeal as frivolous pursuant to PB § 66-8.[2]
>
> **(2)** Conflicts with Plaintiff's "Motion To Lift Automatic Stay ... [which portion was dismissed] And For Sanctions ... [monetary sanctions denied]." (R.A. 214). The Plaintiff's

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[1] Cites to the "Appendix To Defendants-Appellants' Motion For Reconsideration *En Banc*," dated July 21, 2004, will be as (R.A. x).

[2] Pursuant to PB § 66-8, Plaintiff filed a "Motion To Dismiss Defendants' Motion For Review Of Superior Courts' 'Memorandum Re: Articulation/Termination' And Motion For Review Of Superior Courts Decision To Grant Plaintiff's 'Motion To terminate Stay and For Costs'" (R.A. 209), which motion was dismissed by the Appellate Court. (R.A. 222).

primary argument was that "[t]he issues raised by the Defendants in their Motions for Review have been disposed of by this Court in *Schwartz v Murphy*, and by the Judgement entered ... on October 9, 2002." (R.A. 218). The Plaintiff, however, recognized the need for the courts to address the outstanding deed reformation issues pertaining to Defendants' property rights. In his reply, the Plaintiff stated that "[t]hese [reformation] issues ["more precise delineation of the easement area, to reform the deeds in question so that the land records are clarified, to require additional notifications, and to clarify whether or not the hedge can be trimmed below six feet"] will be heard in due time." (R.A. 172).

(3) Conflicts with the Connecticut Supreme Court's holdings in *Texaco, Inc.* v. *Golart*, 206 Conn. 454, 464 n.7, 538 A.2d 1017 (1988), because the issues (R.A. 83) raised by Defendants on appeal (e.g., the inappropriate deed reformation of Defendants' deed, applicable map notations, and the private Dunaway-Contegni Agreement; judicial and attorney misconduct) do not fall within the definition of frivolous as set forth in *Texaco*.[3] Defendants' statement, based on uncontested facts, that the Trial Court's Memorandum (R.A.

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[3] The Court adopted the definition in rule 3.1 of the Rules of Professional Conduct and its comments in determining whether an appeal is frivolous. The court quoted a comment to the rule and concluded that an "'action is frivolous ... if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.'" *See* dissent in *State v. Turner*, 267 Conn. 414, 838 A.2d 947 (2004).

75) and Judgment File (R.A. 80) are based on incorrect facts (R.A. 90-95, 193) more than supports the conclusion that the appeal is not frivolous. The Plaintiff has also failed to meet his burden of proof in establishing the frivolity of the appeal. Except for conclusory allegations, the Plaintiff has not offered a scintilla of evidence, cited any case or provided any legal analysis to show that the appeal is frivolous.[4]

(4) Conflicts with the Appellate Court's directive in *Schwartz v Murphy*, 74 Conn. App. 286, 812 A.2d 87 (2002) (AC 22318) which directed the Trial Court "to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement" (R.A. 17), not just the rights of the Plaintiff. Plaintiff now claims that "the reformation issues are not relevant to this case. If the Defendants wish to clarify the land records let them do so in the appropriate forum." (R.A. 218). It is preposterous to claim that the deed reformation issues raised by the Trial Court's Memorandum and Judgment File should be addressed in another forum where Defendants would need to satisfy the considerable standard of proof needed for a deed reformation and be subject to the *res judicata* doctrine.

(5) Conflicts with the due process, equal protection and property rights provisions of the United States Constitution and the Constitution of the

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[4] On July 20, 2004, the Defendants received a threatening letter from Plaintiff's new attorneys. (R.A. 224). This letter discourages Defendants from filing this Motion For Reconsideration *En Banc* and is further evidence why that "portion of the motion requesting dismissal of the appeal as frivolous" should be reversed. (R.A. 223).

State of Connecticut, and also with the Code of Judicial Conduct.[5]

In this appeal, the Defendants are trying to (i) authenticate a June 14, 1978 letter, which was entered into evidence by the Plaintiff after the trial as an *ex parte* communication; and (ii) identify by judicial notice[6] the source of the admitted falsely alleged six foot height restriction. (R.A. 7-8). The relevant extrinsic evidence contains documents (R.A. 52-55) which show that the falsely alleged six foot height restriction for Defendants' hedge (R.A. 4; para. 5) actually applies to a third party's property. Further, anticipated testimony in connection with the June 14, 1978 letter (R.A. 61), which describes the view easement in the southeast corner of Defendants' property, will show that the letter was the actual source of the view easement in the northeast corner of Defendants' property. This is the appropriate forum to raise the critical deed reformation issues (R.A. 83) which have a direct

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[5] Defendants had the unwelcome task of bringing to this Court's attention allegations of judicial and attorney misconduct. *See* R.A. 160. Left standing, the subject Order dated July 13, 2004 (R.A. 223) sends a chilling message to all litigants that misconduct issues should not be raised on appeal.

[6] The Defendants respectfully request that this Court, sitting *en banc*, take judicial notice of Subdivision Appl. No. 3707 (R.A. 52) and Map No. 12924 (R.A. 55).

bearing on Defendants' rights and obligations regarding the subject view easement.

The issues at bar are extremely important, not only to the Defendants but to all potential litigants in Connecticut's state courts, and warrant the scrutiny of this entire Court.

BRIEF HISTORY OF THE CASE

On September 15, 2000, Plaintiff filed a Complaint (R.A. 4) alleging that Defendants' property is subject to a view easement in his favor and that Defendants have permitted a privet hedge and a large tree to remain in the easement area obstructing Plaintiff's view of the Long Island Sound. Plaintiff asked the Trial Court for a "mandatory injunction requiring the defendants at all times keep their hedges trimmed at six feet or below." (R.A. 6). Defendants denied Plaintiff's material allegations and, *inter alia*, filed a counterclaim to determine the respective rights of the parties with respect to the view easement.

The Trial Court issued a Memorandum of Decision dated August 30, 2001 (R.A. 19) which found that (i) a view easement exists over Defendants' property; (ii) Plaintiff may enforce the view easement; and (iii) Defendants are violating the view

easement by permitting their hedge and tree to grow to a height that impinges on Plaintiff's view of the Sound. The Trial Court granted a mandatory injunction in favor of Plaintiff, ordering Defendants to maintain the view easement in accordance with the Court's specifications.

The Defendants appealed to the Appellate Court and, on December 24, 2002, the Appellate Court issued its opinion (R.A. 10), affirming, in part, and reversing, in part, the judgment of the Trial Court. *Schwartz v Murphy*, AC 22318, *supra*. The Appellate Court ruled, in relevant part, that "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement" (R.A. 16). The case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (R.A. 17). (emphasis added).

Based on newly discovered relevant extrinsic evidence, Defendants then filed a Motion for Reconsideration which was denied by the Appellate Court. The Defendants' Petition for Certification to Appeal was denied by the Supreme Court on April

3, 2003, which denial was not a decision on the merits as implied by the Trial Court. (R.A. 179).

On May 12, 2003, Judge Lewis issued an order (R.A. 31) that "[t]he Plaintiff is to Draft a Judgement File." On May 16, 2003, Defendants filed a Motion to Reconsider Order dated May 12, 2003 (R.A. 32). This Motion was never on the short calendar and the Plaintiff did not submit an objection. This Motion was never ruled on.

Defendants received a Notice dated June 5, 2003 (R.A. 37) from Judge Lewis directing that "any comments by the defendants re: proposed order, should be directed to Judge Lewis in writing not later than June 23, 2003." On June 9, 2003, Defendants issued a facsimile transmission (R.A. 36) to Judge Lewis' clerk stating that they were unaware of any Proposed Order. The clerk was also unaware of any Proposed Order.

The Defendants received a 3-page Notice dated July 14, 2003 (R.A. 38) from the Court which contained a five paragraph Order, which made no mention that the Plaintiff submitted a draft order. According to this Notice, Judge Lewis would sign this Order on August 1, 2003 "barring any objection." On July 23, 2003, the

Defendants filed their "Motion to Object to the Proposed Order Contained in the Notice Dated July 14, 2003" (R.A. 41). On August 5, 2003, the Plaintiff filed his Response (R.A. 62) and on August 12, 2003, Defendants' filed their Reply (R.A. 65) alleging *ex-parte* communications.

On October 9, 2003, Judge Lewis issued his Memorandum (R.A. 75) and Judgement File (R.A. 80). On October 24, 2003, Defendants filed their appeal papers (R.A. 83). On November 1, 2003, Defendants filed their Motions For Rectification (R.A. 85) and Articulation (R.A. 98). The Plaintiff did not file a reply, but on November 4, 2003, filed with the Trial Court a "Motion To Terminate Stay And For Costs." (R.A. 108). On November 16, 2003, Defendants filed a motion in opposition to Plaintiff's motion to terminate stay (R.A. 119) and a motion for disqualification of judicial authority (R.A. 160). Plaintiff's reply recognized Defendants' rights to have their deed reformation issues heard. (R.A. 172).

On May 27, 2004, Judge Lewis issued his Memorandum (R.A. 178) which granted, without a hearing, Plaintiff's motion to terminate stay (R.A. 108) and denied Defendants' Motions for

Articulation (R.A 98) and Rectification (R.A 85). The Defendants filed Motions For Review dated June 4, 2004 (1) "... Of The Superior Court's 'Memorandum Re: Articulation / Termination' ..." (R.A. 189); and (2) "... Of The Superior Court's Decision To Grant Plaintiff's 'Motion To Terminate Stay And For Costs' Without Conducting A Hearing ..." (R.A. 198).

On June 10, 2004, the Plaintiff filed two motions: (1) "Motion To Dismiss Defendants' [two] Motion[s] For Review ..." (R.A. 209); and (2) "Motion To Lift Automatic Stay ... And For Sanctions ...." (R.A. 214). In response to Plaintiff's motion to lift the automatic stay and for sanctions, the Appellate Court issued the subject Order on July 13, 2004 (R.A. 223). This Order (i) dismissed that portion of the motion requesting the lifting of the automatic stay; (ii) denied the portion of the motion requesting monetary sanctions; and (iii) granted, without a hearing as required by PB § 85-3, that "portion of the motion [supposedly] requesting dismissal of the appeal as frivolous."[7]

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[7] On July 13, 2004, the Appellate Court issued three additional Orders. One Order (R.A. 220) granted Defendants' Motion For Review Of The Superior Court's Memorandum Re: Articulation/Termination, but denied the relief requested. Another Order (R.A. 221) granted Defendants' Motion For Review Of The

SPECIFIC FACTS UPON WHICH THE MOVING PARTY RELIES

(1) The Trial Court did not hold a hearing before the imposition of any sanction pursuant to PB § 85-3. The Plaintiff failed to file a motion to dismiss the appeal as frivolous pursuant to PB § 66-8 and, in connection with his stay/sanctions motion, he did not meet the burden of proof to establish the frivolity of the appeal. Instead of filing a motion to dismiss Defendants' October 24, 2003 appeal as frivolous pursuant to PB § 66-8, Plaintiff filed a motion (R.A. 214) to lift automatic stay in connection with the Defendants' motions for review dated June 4, 2004 under PB § 61-14 and for sanctions under PB §§ 85-2(4) and (5).[8] The Plaintiff does nothing more than make a bare statement that the appeal is frivolous by reciting the Practice Boook provision and, without any authority, argues that the

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Superior Court's Decision To Grant Plaintiff's Motion To Terminate Stay, but denied the relief requested. The final Order (R.A. 222) dismissed Plaintiff's Motion To Dismiss Defendants' Motions For Review.

[8] Regarding PB § 85-2(5), Plaintiff moved to sanction one of the Defendants ("Defendant, Karen Murphy, be sanctioned for her presentation of unnecessary and unwarranted motions and presentations of a frivolous appeal on frivolous issues on appeal." -- R.A. 218-219), not to dismiss the appeal.

Defendants have no appeal rights with respect to the Trial Courts' Memorandum (R.A. 75) and Judgment File (R.A. 80).

(2) The record shows that all the issues in this controversy about the view easement have not been fully litigated and even the Plaintiff acknowledges Defendants' outstanding deed reformation issues. Defendants' Motion For Rectification (R.A. 85) identified several material omissions and errors pertaining to the Memorandum and Judgement File. For example, the Memorandum and Judgement File did not discuss the deed reformation issues pertaining to Defendants' deed (R.A 182), Map Nos. 10716 and 12226 (R.A. 184), the Dunaway-Contegni Agreement (R.A. 185), and the Planning Board letter of June 14, 1978 (R.A. 61). The Plaintiff concedes that the Defendants have outstanding deed reformation issues not addressed by the courts. *See* item (2) at page 2, *supra.* These deed reformation issues relate directly to the Defendants' rights and obligations with respect to the maintenance of the view easement and, as such, the Memorandum and Judgement File should have also addressed the following material reformation issue questions left open by the Appellate Court (R.A. 10) and which have not been addressed by

the Trial Court:

(1) Did the Trial Court's decision eliminate two easements (i.e., one in the southeast corner of Defendants' property, as stated in the Planning Board letter of June 14, 1978 (R.A. 61) and Defendants' deed (R.A. 182); and the one on the southwestern corner of a third party's property, as stated in the unpled Dunaway-Contegni Agreement (R.A. 185)).

(2) Did the Trial Court decision subject the Defendants' property to two easements (i.e., one in the northeast corner of the property as pled (R.A. 4) and as shown on the applicable maps (R.A. 184), and one in the southeast corner of the property as noted above).

(3) Are the dimensions of the view easement as shown on the applicable maps (R.A. 184) or as stated in the Dunaway-Contegni Agreement (R.A. 185), and what is the basis for this decision.

(4) Are the notations on the relevant maps and the Dunaway-Contegni Agreement, in place for more than 20 years, to be changed to reflect Judge Lewis' determination that the "plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet and to trim the elm tree so that it is maintained at approximately the same height as shown in exhibits 12 and 13 ...." (R.A. 81-82). If so, what is the authority for these reformations. What are the rights of the other parties to the Dunaway-Contegni Agreement and are they entitled to notification of the fact that the agreement has been reformed.

The Motion For Rectification also identified a material error (R.A. 93-94) in the Memorandum whereby Judge Lewis incorrectly described the "newly discovered relevant extrinsic evidence" detailed in Defendants' opposition to the proposed order. (R.A. 41). Judge Lewis incorrectly summarized Defendants' position as standing for the proposition that "this alleged newly discovered evidence [shows] that the view easement applies to some other person's property, but not to their property, and that the Planning Board of the city of Stamford did not impose a view easement over the defendants' property." (R.A. 78-79). The Defendants actually stated (R.A. 42-44) that this evidence shows that:

(1) Subdivision Appl. No. 3707 and Map No. 12924 is the source for the falsely alleged six foot height restriction for the subject hedge and bushes on defendants' property;

(2) The June 14, 1978 letter is the source of the restriction in the northeastern corner of Defendants' property; and

(3) The Planning Board never required city of Stamford property owners to cut existing plantings, to include bushes and trees, at the time when such restrictions are imposed.

Finally, the Appellate Court, like the Trial Court, failed to even address Defendants' allegations of attorney and judicial misconduct (*See* R.A. 160).

LEGAL GROUNDS UPON WHICH THE MOVING PARTY RELIES

(1) The Appellate Court did not conduct a hearing in establishing the frivolity of the appeal as required by PB § 85-3. Practice Book § 85-3 provides that "[a] hearing at which any party may be heard shall be held before the imposition of any sanction." Further, the Plaintiff did not meet, and could not have met, his burden of proof in establishing the frivolity of the appeal in his motion to lift the stay and for sanctions. (R.A. 214).[9] Similar to his attempts to lift the automatic stay, Plaintiff simply makes conclusory allegations, without any factual or legal analysis. The Plaintiff never filed a Motion to Dismiss pursuant to PB § 66-8 within ten after the Defendants filed their appeal.

(2) The issues (R.A. 83) raised by the Defendants on appeal do not meet the definition of frivolous as defined in

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[9] In *Texaco, supra,* the Connecticut Supreme Court held that "the burden of proof lies on the moving party to establish the frivolity of the appeal." (See also *Schoonmaker v. Lawrence Brunoli, Inc.*, 265 Conn. 210, 828 A.2d 64 (2003)).

Texaco, supra. The deed reformation, misapprehension of the relevant extrinsic evidence, and misconduct issues go right to the heart of this matter and must be addressed in order to comply with the Appellate Court's directive "to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement" (R.A. 17). The Trial Court's Memorandum (R.A. 75) and Judgment File (R.A. 80) focused on the rights of the Plaintiff to the exclusion of the rights of the Defendants.

(3) The subject Order (R.A. 223) disregarded the Defendants' due process, equal protection and property rights under both the United States and Connecticut constitutions, and conflicts with the Code of Judicial Conduct.

WHEREFORE, for the reasons herein stated, the Defendants respectively request that the Appellate Court, sitting *en banc*, reconsider the subject Order dated July 13, 2004 (R.A. 223) and reverse its decision granting that portion of Plaintiff's "motion requesting dismissal of the appeal as frivolous" and grant such other relief as the Court deems just.

Dated at Stamford, Connecticut, this 21st day of July, 2004.

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APPELLATE COURT

OF THE

STATE OF CONNECTICUT

SECOND TERM
OCTOBER 2004

SUPERIOR COURT JUDICIAL DISTRICT OF
STAMFORD/NORWALK AT STAMFORD

APPELLATE COURT NO.: A.C. 24754

KENNETH SCHWARTZ
Plaintiff Appellee

VS.

KAREN A. MURPHY and KATHLEEN A. MURPHY
Defendants Appellants

DEFENDANTS APPELLANTS' MEMORANDUM OF LAW CITING REASONS WHY THE APPEAL SHOULD NOT BE DISMISSED AS FRIVOLOUS

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PRELIMINARY STATEMENT

In accordance with the Order of the Appellate Court, this memorandum sets forth the reasons why Defendants' appeal should not be dismissed as frivolous. The Defendants have always been clear about the primary issue on appeal, namely, that the Trial Court did not comply with the mandate remand of the Appellate Court. Similarly, the Defendants have been clear about the other issues on appeal, namely, judicial and attorney misconduct. *See* factual presentations in Defendants' (i) Motion for Rectification (R.A. 85); (ii) Motion for Articulation (R.A. 98); (iii) Motions For Review (R.A. 189 and 198), and (iv) Preliminary Statement Of The Issues (R.A. 83).[1]

In its opinion of December 24, 2002, this Court reversed the Trail Court's judgment "insofar as it grants a mandatory injunction in favor of the plaintiff and the case is remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this

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[1] This memorandum cites page numbers to the "Appendix To Defendants-Appellants' Motion For Reconsideration *En Banc*," dated July 21, 2004, as (R.A. x).

opinion." (R.A. 16-17). The Trial Court incredulously interpreted this mandate to mean: "The only thing that remained for this court [upon remand] was the entry of [a non-appealable] judgment." (R.A. 179)

The law could not be clearer. The Trial Court's specific mandatory injunction orders were rendered completely void by the reversal and remand of the Appellate Court. Judge Lavery, who wrote the Appellate Opinion in the case at bar, stated in his dissent in *Mulholland v. Mulholland*, 31 Conn. App. 214, 624 A.2d 379 (1993), that:

> This survey of case law clearly indicates that since the earliest years of Connecticut jurisprudence, our Supreme Court has recognized that the reversal of an order of the Superior Court renders that order completely void, and puts the parties back in the positions they occupied before the original action was brought.

Numbered paragraphs (2)-(5) of the five (5) paragraph Judgment File (R.A. 81-82) address the subject of rights and each paragraph makes clear that the rights being addressed are exclusively those of the Plaintiff ("The plaintiff ... has the right ...;" "The plaintiff's right ...;" "The plaintiff has the right ...;" and "The plaintiff and his agents have the right ...."). On its face, the Trial Court's Judgment File fails to even address the rights of the

Defendants, let alone render any determinations. This failure to comply with the Appellate Court's broad mandate is not surprising given that Plaintiff's counsel drafted the Judgment File and then submitted it to the Trial Court in an *ex parte* communication.

As the record in this case demonstrates, the conclusions of the Trial Court are legally and logically inconsistent with the facts and the remand order, and involve the application of erroneous, or no, rule of law. This case is on the other end of the spectrum from *Connecticut National Bank v.* Zuckerman, 31 Conn. App. 440 (1993) (where the appellant filed an appeal challenging the trial court's refusal to act beyond the scope of the remand order) and, as addressed in Defendants' Motion For Reconsideration *En Banc*, is clearly not frivolous as defined *Texaco, Inc. v. Golart* 206 Conn. 454 (1988). In fact, the record shows that this Court would be justified in ordering a new trial *nunc pro tunc*. "The underlying principle on which judgments nunc pro tunc are sustained is that such action is necessary in furtherance of justice and in order to save a party from unjust

prejudice ... caused by the acts of the court or the course of judicial procedure. In other words, the practice is intended merely to make sure that one shall not suffer for an event which he could not avoid." *Gary Excavating Co. v. North Haven*, 163 Conn. 428, 311 A.2d 90 (1972).

Statement of Facts

The facts and procedural history of this case and the underlying matter were most recently set forth by the Defendants in their Motion For Reconsideration *En Banc* and in the Appendix To Defendants-Appellants' Motion For Reconsideration *En Banc*. Therefore, the facts are only briefly recited here and are noted as needed in other sections of this memorandum.

The Defendants' claim that, read in its entirety, the multi-party Dunaway-Contegni Agreement is clear and unambiguous. The ambiguity the Appellate Court found did not emanate from the language used in the Dunaway-Contegni Agreement.[2] Rather, the Appellate Court found ambiguity in two other documents --

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[2] Paragraph 3 of the Dunaway-Contegni Agreement states that: "No dwelling, accessory structure or view obstruction shall be located in the triangular area 50' x 95' x110' at the Southwesterly corner of said premises." (R.A. 187).

Defendants' deed, specifically restriction 6, and Map 12226 -- and then imputed that ambiguity into the Dunaway-Contegni Agreement, which is separately addressed in restriction 7 in Defendants' deed. It is unequivocal that the Plaintiff has no rights in either Map 12226 (R.A. 184) or Defendants' deed (R.A. 182). The Appellate Court held that restriction 6 was inconsistent with the Maps. The 5th, 6th and 7th restrictions in Defendants' deed provide as follows:

> **(5)** Notations as shown on Maps Numbered 10716 and 12226.[3]
>
> **(6)** Restriction as to view obstruction and location of accessory structures affecting the southeasterly corner of the premises as shown on said map, 12226.
>
> **(7)** Restrictive covenants and agreements set forth in a certain agreement between Faye Dunaway and John A. Contegni, et al, date February 2, 1981 and recorded in Volume 2050 at Page 349.

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[3] Map 12226 shows in the northeast corner of the Defendants' property a restriction that states: "No accessory structures or view obstructions shall be placed in this area," a triangular area 50' x 100x 110.

There is no ambiguity between the Dunaway-Contegni Agreement and Defendants' deed, specifically restriction 7. The Appellate Court found that one could misread the applicable maps,[4] but there is no reference to any map in the Dunaway-Contegni Agreement and there are absolutely no misunderstandings in that Agreement regarding the direction of north, south, east or west.[5] Further, the Dunaway-Contegni Agreement and the Defendants' deed make references to restrictive covenants, not to any view easement.[6]

The City of Stamford's Planning Board, as the Appellate Court recognized, is the source of the restriction reflected in restrictions 5 and 6 of the Defendants' deed (R.A. 182) and Map 12226 (R.A. 184), and it is precisely that evidence from the City

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[4] "[A]lthough map nos. 10716 and 12226 both contain handwriting markings that indicate which direction is north, those markings are not easily discerned and, without that directional guidance, the view easement ... appears to be ... in the *southeasterly* corner of the defendants' property because of the directional orientation of the maps." (R.A. 14).

[5] *See* description of subdivision property in the Dunaway-Contegni Agreement at R.A. 187. Further, paragraph no. 1 on that page states that "[t]he parcel after subdivision, located on the Northerly boundary and contiguous to the property now owned by [the Plaintiff] shall be an area of not less than 27,500 square feet."

[6] As noted in the Appellate Court opinion, the Dunaway-Contegni Agreement states in relevant part: "The intent of these restrictive covenants ...." (emphasis added). (R.A. 15).

that is needed to determine the rights and obligations of the Defendants.[7] Numbered paragraph 2 of the June 14, 1978 letter (R.A. 61) from the City of Stamford's Planning Board states:

2) Lot 3 on said "Staff Alternate Plan" shall be subject to the further restriction that no accessory structures or view obstructions be placed in the triangular area 50 x 95 x 110 ft. at its southeasterly corner.

Without any evidence in the record,[8] the Appellate Court interpreted the above Planning Board restriction as follows: "In granting that subdivision application, the planning board, inter alia, imposed a condition that a triangular area in the corner of what is

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[7] The Appellate Court recognized that there were (and are) multiple parties to the Dunaway-Contegni Agreement (R.A. 15-16), and that the Planning Board was the source of the restriction on Map 12226. Yet, without any evidence in the record from these parties, the Appellate Court (at its footnote 3) cited favorably the Trial Court's observation that "if the view easement is not for the benefit of the plaintiff's property, it is difficult to discern the identity of any other beneficiary." (R.A. 17).

[8] None of the 10 maps or other documents included in the Planning Board's file (*see* Plaintiff's Exhibit 16) were authenticated. The file, which any person can access without supervision, was submitted one week after the trial in an *ex parte* communication.

presently the defendants' property be subject to a view easement."[9] (R.A. 14).

The record is void of any facts explaining the Planning Board's June 14, 1978 letter. Recall that the Plaintiff called no witnesses other than himself; did no discovery; wrote an eight paragraph complaint which never mentioned the Dunaway-Contegni Agreement (R.A. 4); and subsequently acknowledged, in an *ex-parte* communication, that a material allegation in the complaint (i.e., para. 5) was false (R.A. 2), yet he never amended his pleadings. The extrinsic evidence (R.A. 51-61), which is explained at R.A. 42-44, and which the Trial Court misstated,[10] shows that:

(1) Subdivision Appl. No. 3707 and Map No. 12924 is the source for the falsely alleged six foot height restriction for the subject hedge and bushes on Defendants' property;

(2) The June 14, 1978 letter is the source of the restriction in the northeastern corner of Defendants' property; and

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[9] The Appellate Court also stated: "It is undisputed that the hedge and tree existed in the easement area prior to the creation of the view easement."

[10] *See* Defendants' Motions for Rectification (R.A. 85) and Articulation (R.A. 98).

(3) The Planning Board never required city of Stamford property owners to cut existing plantings, to include bushes and trees, at the time when such restrictions are imposed.

Listed below are the non addressed deed reformation issue questions, which the Plaintiff acknowledges,[11] pertaining to Defendants' property which relate directly to the Appellate Court mandate regarding a determination of rights and obligations in connection with the view easement:

(5) Did the Trial Court's decision eliminate two easements (i.e., one in the southeast corner of Defendants' property, as stated in the Planning Board letter of June 14, 1978 (R.A. 61) and Defendants' deed (R.A. 182); and the one on the southwestern corner of a third party's property, as stated in the unpled Dunaway-Contegni Agreement (R.A. 185)).

(6) Did the Trial Court decision subject the Defendants' property to two easements (i.e., one in the northeast as shown on the applicable maps (R.A. 184), and one in the southeast corner of the property as noted above).

(7) Are the dimensions of the view easement as shown on the applicable maps (R.A. 184) or as stated in the Dunaway-Contegni Agreement

[11] The Plaintiff stated that "[t]hese [reformation] issues ["more precise delineation of the easement area, to reform the deeds in question so that the land records are clarified, to require additional notifications, and to clarify whether or not the hedge can be trimmed below six feet"] will be heard in due time ...." (R.A. 172).

(R.A. 185), and what is the basis for this decision.

(8) Are the notations on the relevant maps and the Dunaway-Contegni Agreement, in place for more than 20 years, to be changed to reflect Judge Lewis' determination that the "plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet and to trim the elm tree so that it is maintained at approximately the same height as shown in exhibits 12 and 13 ...." (R.A. 81-82). If so, what is the authority for these reformations. What are the rights of the other parties to the Dunaway-Contegni Agreement and are they entitled to notification of the fact that the Agreement has been reformed.

Argument

The Defendants have always been clear about the primary issue on appeal, namely, that the Trial Court did not comply with the mandate remand of the Appellate Court. Similarly, the Defendants have been clear about the other issues on appeal, namely, judicial and attorney misconduct. *See* factual presentations in Defendants' (i) Motion for Rectification (R.A. 85); (ii) Motion for Articulation (R.A. 98); (iii) Motions For Review (R.A. 189 and 198); and (iv) Preliminary Statement Of The Issues (R.A. 83).

In its opinion of December 24, 2002, this Court reversed the Trail Court's judgment "insofar as it grants a mandatory injunction in favor of the plaintiff and the case is remanded with

direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (R.A. 16-17). The Trial Court incredulously interpreted this mandate to mean: "The only thing that remained for this court [upon remand] was the entry of [a non-appealable] judgment." (R.A. 179). The Trial Court further stated that "[i]t was not necessary that a memorandum of decision be filed in the first place ...." (R.A. 180). Yet, in the Trial Court's memorandum, it stated that "[t]his memorandum decision discusses this very issue [i.e., the determination of the parties' rights and obligations]." (R.A. 78). That memorandum, however, made no mention of, reference to, or attempt to interpret the Dunaway-Contegni Agreement, the very Agreement which the Trial Court found that permits the Plaintiff to enforce the "restriction or condition." (R.A. 25).

Because the Trial Court did not comply with the Appellate Court's broad mandate on reversal "to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement," the appeal should not be dismissed as frivolous. In *Connecticut National Bank v.*

Zuckerman 31 Conn. App. 440 (1993), the appellant challenged "the trial court's refusal to act beyond the scope of [the Appellate Court's] remand ... amount[ing] to a purely dilatory tactic on the part of the defendants." Unlike the narrow mandate from the Appellate Court in *Zuckerman,* which did not involve a reversal, the mandate from the Appellate Court in the case at bar was broad ("determine the respective rights ..."). The Defendants' appeal is not based on the contention that the trial Court refused to act beyond the narrow scope of the Appellate Court's mandate, but on the fact that the Trial Court did not comply with the broad mandate from the Appellate Court to determine the rights of the parties, not just the rights of the Plaintiff.

With regard to determining the "rights and obligations of the parties," as mandated by the Appellate Court, the law is clear:

- The reversal of an erroneous judgment and the remanding of the case restores the parties to the same condition in which they were before the erroneous judgment was rendered, so that they may proceed with the case in the Trial Court in the same manner as if the case had not been tried and decided, except as to matters not affected by the judgment of reversal. *See* Judge Lavery's summary of the general rule regarding reversals in his dissent in *Mulholland v. Mulholland*, 31 Conn. App. 214, 624 A.2d 379 (1993). Here, the only issue not

reversed was the finding that a restriction/easement exists in the northeast corner of Defendants' property. That finding was based on Court-found typographical or scrivener's errors. (R.A. 17, footnote 6).

- In interpreting a remand mandate the Trial Court ordinarily is not permitted to deviate from the directions of this Court. *See Gary Excavating Co. v. North Haven*, 163 Conn. 428, 311 A.2d 90 (1972), citing *Ireland v. Connecticut Co.*, 112 Conn. 452, 454,152 A. 614. This Court, in *TDS Painting & Restoration V. Copper Beech Farm, 73 Conn. App. 492, 808 A.2d 726* (2002), further clarified how its mandates are to be interpreted:

> We have rejected efforts to construe our remand orders so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand.

Here, this Court's remand order did not preclude the consideration of additional relevant extrinsic evidence. In fact, it is apparent from the mandate that, in excluding the evidence (e.g., authentication of the City of Stamford's subdivision restrictions, which were part of Plaintiff's Exhibit 16, which was submitted on an *ex-parte* basis), the Trial Court failed to follow this Court mandate. In its opinion, the Appellate Court clearly noted that "[i]f the meaning of the language contained in a deed or conveyance is not clear [e.g., the terms of the Dunaway-Contegni Agreement regarding the rights and obligations of the parties], the trial court is bound to consider any relevant extrinsic evidence presented by the parties ...." (R.A. 13). It is further apparent from the record that the proffered evidence was relevant to the determination of the rights and

obligations of the parties and, because it may have affected the Trail Court's determination of respective rights and obligations, its exclusion was harmful.

- A judgment establishing the terms of the servitude should be so precise and definite in its terms that the parties may clearly understand what acts are to be done by them on the one side and the other, and how their rights are determined. *See Goldberg v. Krayeske*, 102 Conn. 137, 144, 128 A. 27 (1925). The fact that servitudes are intended to bind successors in interest in the land and are generally intended to last for an indefinite period of time, lends increased importance to the writing of the servitude. *See Dent v. Lovejoy et al.* (A.C. 23009), an officially released opinion dated October 12, 2004.[12]

  As Defendants' Motions for Articulation and Rectification indicate, the Trial Court not only misinterpreted material facts and failed to resolve Defendants' deed reformation issues (which Plaintiff's counsel even acknowledges), but also issued an unclear judgment. For example, the Judgment File states that "[t]he plaintiff has the right to trim the hedge and other bushes ... to a maximum height of six (6) feet," which means the Plaintiff can trim the hedge and bushes to less than an inch, effectively removing them. (R.A. 81). The Appellate Court implied in footnote 8 to its opinion that, if the facts and law support it, "if the hedge and other bushes ... are kept at a height of six feet ..., there is no impingement on the plaintiff's view ...." (R.A. 18). (emphasis added). This is a materially different instruction to the Trial Court than it

[12] Defendants request that the principles for interpreting servitudes as set forth in *Dent*, the most recent case filed by the Appellate Court on this issue, be applied to the case at bar.

adopted. The Judgment File further provides that the Plaintiff can enter Defendants' property "only at reasonable times and not on weekends." (R.A. 82). Thus, the Defendants are entitled to no notice and, so long as a holiday does not fall on a weekend (e.g., Christmas), trimming and pruning would be permitted. These determined rights of the Plaintiff are clearly unreasonable. And, as noted in the preliminary statement, the Judgment File fails to determine the Defendants' rights.

- The appearance and the existence of partiality by Judge Lewis have been well documented. *See* Defendants' Motion for Disqualification of Judicial Authority. (R.A. 160).

The conclusions of the Trial Court are legally and logically inconsistent with the facts and the remand order, and involve the application of erroneous, or no, rule of law.

Conclusion

The holdings in *Zuckerman* and *Texaco* do not support a determination that Defendants' appeal should be dismissed as frivolous. Neither of these cases can be construed to condone the judicial and attorney misconduct in this case which resulted in the Trial Court delegating its mandated obligation to determine the respective property rights of the parties to Plaintiff's counsel. In fact, based on the case discussed above and set forth in the record in this case, this Court would be justified in ordering a new trial

nunc pro tunc.

Respectfully submitted this 15th day of October, 2004 by the Defendants-Appellants.

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APPELLATE COURT
OF THE
STATE OF CONNECTICUT

SECOND TERM
OCTOBER 2004

SUPERIOR COURT
JUDICIAL DISTRICT OF STAMFORD/NORWALK AT
STAMFORD

APPELLATE COURT NO.: A.C. 24754

KENNETH SCHWARTZ

Plaintiff Appellee

VS.

KAREN A. MURPHY and KATHLEEN A. MURPHY

Defendants Appellants

MOTION FOR RECONSIDERATION *EN BANC*
DATED OCTOBER 28, 2004

FOR DEFENDANTS APPELLANTS

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MOTION FOR RECONSIDERATION *EN BANC*

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE APPELLATE COURT:

GROUNDS FOR RECONSIDERATION AND WHY RECONSIDERATION *EN BANC* IS NECESSARY

Pursuant to Connecticut Practice Book ("PB") § 71-5, the Defendants Appellants file this Motion For Reconsideration *En Banc* and the accompanying Appendix[1] on the grounds that the Appellate Court Order (R.A. 258) dated October 20, 2004, which dismissed Defendants' appeal as frivolous:

(1) Conflicts with the Appellate Court's reversal and remand order in *Schwartz v Murphy*, 74 Conn. App. 286, 812 A.2d 87 (2002) (AC 22318) which directed the Trial Court "to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement," not just the rights of the Plaintiff. (R.A. 17). The Plaintiff even recognized the need for the Courts to address the outstanding deed reformation issues pertaining to Defendants' property rights when he stated that "[t]hese [reformation] issues ["more precise delineation of the easement area; to reform the deeds in question so that the land records are clarified; to require additional notifications; and to clarify whether or not the hedge can be trimmed below six feet"] will be heard in due time." (R.A. 172). Plaintiff subsequently stated that "the reformation issues are not relevant to this case. If the Defendants wish to clarify the land records let them

[1] Cites to this Appendix will be as (R.A. x).

do so in the appropriate forum." (R.A. 218). It is impossible to explain or justify how this Court could agree that the deed reformation issues raised by the Trial Court's Memorandum (R.A. 75) and Judgment File (R.A. 80) should be addressed in another forum where Defendants would need to satisfy the considerable standard of proof needed for a deed reformation and be subject to the *res judicata* doctrine.

(2) Conflicts with well settled Connecticut case law which recognizes that the reversal of an order of the Superior Court renders that order completely void, and puts the parties back in the positions they occupied before the original action was brought.

(3) Conflicts with this Court's holdings in *Connecticut National Bank v. Zuckerman*, 1 Conn. App. 440, 441-42 (1993). The case at bar is on the other end of the spectrum from *Zuckerman* (where the appellant filed an appeal challenging the trial court's refusal to act beyond the scope of the remand order). Unlike the narrow mandate from the Appellate Court in *Zuckerman*, which did not involve a reversal, the mandate from the Appellate Court in this case was broad ("determine the respective rights") and the Trial Court did not comply.

(4) Conflicts with the Connecticut Supreme Court's holdings in *Texaco, Inc.* v. *Golart*, 206 Conn. 454, 464 n.7, 538 A.2d 1017 (1988), because the issues (R.A. 83) raised by Defendants on appeal (e.g., the inappropriate deed reformation of Defendants' deed; applicable map notations; the private Dunaway-Contegni Agreement; misapprehension of the facts; and judicial and attorney misconduct)[2] do not fall within the

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[2] *Ex parte* communication raises a rebuttable presumption of prejudice. Once the Defendants show an improper *ex parte* communication has occurred, the burden of showing that the communication was harmless shifts to the party seeking to uphold the validity of the decision. *Daniel v. Zoning Commission of the City of Norwalk*, 35 Conn. App. 594,645 A.2d 1022. The

definition of frivolous as set forth in *Texaco.*[3]

(5) Conflicts with PB Chapter 85 in that the Defendants were never granted a hearing, as required by PB § 85-3, before the imposition of the ultimate sanction. Instead of ordering a hearing pursuant to PB § 85-3, the Appellate Court listed the appeal on its own motion calendar (R.A. 244) "as to whether or not the appeal should be dismissed as frivolous," pursuant to PB § 60-2, which action denied Defendants a hearing and shifted the burden of proof to the Defendants.[4]

(6) Conflicts with the due process, equal protection and property rights provisions of the United States Constitution and the Constitution of the State of Connecticut, and also with the Code of Judicial Conduct.

BRIEF HISTORY OF THE CASE

The procedural history of this case and the underlying matter, prior to July 21, 2004, was most recently set forth by the Defendants in their Motion For Reconsideration *En Banc* dated

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Defendants here were harmed by the *ex parte* communications wherein the Plaintiff's counsel drafted the Judgment File (R.A. 80) that completely ignored the Defendants' rights in connection with the restriction/easement. *See* R.A. 160; 231; 239.

[3] *See* footnote 3 at R.A. 227-228.

[4] In *Texaco, supra*, the Connecticut Supreme Court held that "the burden of proof lies on the moving party to establish the frivolity of the appeal." Except for conclusory allegations, the Plaintiff in this case has not offered a scintilla of evidence, cited any case or provided any legal analysis to show that the appeal is frivolous, nor did he rebut any of the law or facts cited in Defendants' Memorandum Of Law Citing Reasons Why The Appeal Should Not Be Dismissed As Frivolous" (R.A. 245) dated October 15, 2004.

July 21, 2004. *See* R.A. 229-232.

On July 21, 2004, the Defendants filed their "Motion For Reconsideration *En Banc*" (R.A. 226) and an accompanying appendix. On July 30, 2004, the Plaintiff filed his "Objection." (R.A. 238). The Appellate Court issued an Order dated September 13, 2004 (R.A. 244) granting Defendants' Motion For Reconsideration *En Banc* and setting the matter for hearing on its own motion. On October 18, 2004, the Defendants filed their "Memorandum Of Law Citing Reasons Why The Appeal Should Not Be Dismissed As Frivolous" dated October 15, 2004. (R.A. 245). On October 20, 2004, the parties were each granted five minutes, with no rebuttal, to argue their case before a panel of four Judges (Judge Flynn recused). The Appellate Court issued its Order dated October 20, 2004 stating only that "[a]fter hearing as to why the appeal should not be dismissed as frivolous, it is hereby ordered that the matter is dismissed." (R.A. 258).[5]

SPECIFIC FACTS UPON WHICH THE MOVING PARTY

[5] This Court's one-sentence Order prevents analytical scrutiny against the record evidence. This Order, together with the Order of July 13, 2004 (R.A. 223), sends a chilling message to all litigants that documented misconduct issues should not be raised on appeal.

RELIES

(1) The Defendants have always been clear about the primary issue on appeal, namely, that the Trial Court did not comply with the mandate remand of the Appellate Court. Similarly, the Defendants have been clear about the other issues on appeal, namely, judicial and attorney misconduct. *See* factual presentations in Defendants' (i) Motion for Rectification (R.A. 85); (ii) Motion for Articulation (R.A. 98); (iii) Motions For Review (R.A. 189 and 198); and (iv) Preliminary Statement Of The Issues (R.A. 83).

In its opinion of December 24, 2002, this Court reversed the Trial Court's judgment and remanded with the broad directive "to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (R.A. 16-17). The Trial Court incredulously interpreted this mandate to mean: "The only thing that remained for this court [upon remand] was the entry of [a non-appealable] judgment." (R.A. 179). The Trial Court further stated that "[i]t was not necessary that a memorandum of decision be filed in the first place ...." (R.A. 180). Yet, in the Trial Court's

memorandum, it stated that "[t]his memorandum decision discusses this very issue [i.e., the determination of the parties' rights and obligations]." (R.A. 78). That memorandum, however, made no mention of, reference to, or attempt to interpret the Dunaway-Contegni Agreement, the very Agreement which the Trial Court found that permits the Plaintiff to enforce the "restriction or condition." (R.A. 25).

Numbered paragraphs (2)-(5) of the five (5) paragraph Judgment File (R.A. 81-82) address the subject of rights and each paragraph makes clear that the rights being addressed are exclusively those of the Plaintiff ("The plaintiff ... has the right ...;" "The plaintiff's right ...;" "The plaintiff has the right ...;" and "The plaintiff and his agents have the right ...."). On its face, the Trial Court's Judgment File fails to even address the rights of the Defendants, let alone render any determinations. This failure to comply with the Appellate Court's broad mandate is not surprising given that Plaintiff's counsel drafted the Judgment File and then submitted it to the Trial Court in an *ex parte* communication. (R.A. 160; 231).

(2) The Trial Court first misstated the relevant

extrinsic evidence and then excluded this material evidence from its consideration. The Defendants are trying to (i) authenticate a June 14, 1978 letter, which was entered into evidence by the Plaintiff after the trial as an *ex parte* communication; and (ii) identify by judicial notice[6] the source of the admitted falsely alleged six foot height restriction. (R.A. 7-8). The relevant extrinsic evidence (R.A. 51-61), which is explained at R.A. 42-44, and which the Trial Court misstated,[7] shows that:

(A) Subdivision Appl. No. 3707 and Map No. 12924 is the source for the falsely alleged six foot height restriction for the subject hedge and bushes on Defendants' property;

(B) The June 14, 1978 letter is the source of the restriction in the northeastern corner of Defendants' property; and

(C) The Planning Board never required city of Stamford property owners to cut existing plantings, to include bushes and trees, at the time when such restrictions are imposed.

(3) The Plaintiff acknowledges Defendants' outstanding deed reformation issues created by the Judgment File. (*see* ¶1 at p. 2). The non-addressed issues are:

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[6] *See* footnote 6 at R.A. 228.

[7] *See* Defendants' Motions for Rectification (R.A. 85) and Articulation (R.A. 98).

(A) Did the Trial Court's decision eliminate two easements (i.e., one in the southeast corner of Defendants' property, as stated in the Planning Board letter of June 14, 1978 (R.A. 61) and Defendants' deed (R.A. 182); and the one on the southwestern corner of a third party's property, as stated in the unpled Dunaway-Contegni Agreement (R.A. 185))?

(B) Did the Trial Court decision subject the Defendants' property to two easements (i.e., one in the northeast as shown on the applicable maps (R.A. 184), and one in the southeast corner of the property as noted above)?

(C) Are the dimensions of the view easement as shown on the applicable maps (R.A. 184) or as stated in the Dunaway-Contegni Agreement (R.A. 185), and what is the basis for this decision?

(D) Are the notations on the relevant maps and the Dunaway-Contegni Agreement, in place for more than 20 years, to be changed to reflect Judge Lewis' determination that the "plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet and to trim the elm tree so that it is maintained at approximately the same height as shown in exhibits 12 and 13 ...." (R.A. 81-82). If so, what is the authority for these reformations? What are the rights of the other parties to the Dunaway-Contegni Agreement and are they entitled to notification of the fact that the Agreement has been reformed?

LEGAL GROUNDS UPON WHICH THE MOVING PARTY RELIES

I. *THE REVERSAL OF AN ERRONEOUS JUDGMENT AND THE REMANDING OF THE CASE RESTORES THE PARTIES TO THE SAME CONDITION IN WHICH THEY WERE BEFORE THE ERRONEOUS JUDGMENT WAS RENDERED.*

The reversal of an erroneous judgment and the remanding of the case restores the parties to the same condition in which they were before the erroneous judgment was rendered, so that they may proceed with the case in the Trial Court in the same manner as if the case had not been tried and decided, except as to matters not affected by the judgment of reversal. *See* Judge Lavery's summary of the general rule regarding reversals in his dissent in *Mulholland v. Mulholland*, 31 Conn. App. 214, 624 A.2d 379 (1993). Here, the only issue not reversed was the finding that a restriction/easement exists in the northeast corner of Defendants' property. That finding was based on Court-found typographical or scrivener's errors. (R.A. 17, footnote 6).

II. *Appellate Court remand orders are not to be construed so narrowly as to prohibit a Trial Court from considering matters relevant to the issues upon which further proceedings are ordered.*

In interpreting a remand mandate, the Trial Court ordinarily is not permitted to deviate from the directions of this Court. *See Gary Excavating Co. v. North Haven*, 163 Conn. 428,

311 A.2d 90 (1972). This Court, in *TDS Painting & Restoration V. Copper Beech Farm, 73 Conn. App. 492, 808 A.2d 726* (2002), further clarified how its mandates are to be interpreted:

> We have rejected efforts to construe our remand orders so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand.

Here, this Court's remand order did not preclude the consideration of additional relevant extrinsic evidence. In fact, it is apparent from the mandate that, in excluding the evidence (e.g., authentication of the City of Stamford's subdivision restrictions, which were part of Plaintiff's Exhibit 16, which was submitted on an *ex-parte* basis), the Trial Court failed to follow this Court's mandate. In its opinion, the Appellate Court clearly noted that "[i]f the meaning of the language contained in a deed or conveyance is not clear [e.g., the terms of the Dunaway-Contegni Agreement regarding the rights and obligations of the parties], the trial court is bound to consider any relevant extrinsic evidence presented by the parties ...." (R.A. 13). (emphasis added). It is further apparent from the record that the proffered evidence was relevant to the

determination of the rights and obligations of the parties and, because it may have affected the Trial Court's determination of respective rights and obligations, its exclusion was harmful.

III. *A judgment establishing the terms of the servitude should be so precise and definite in its terms that the parties may clearly understand what acts are to be done by them.*

A judgment establishing the terms of the servitude should be so precise and definite in its terms that the parties may clearly understand what acts are to be done by them on the one side and the other, and how their rights are determined. *See Goldberg v. Krayeske*, 102 Conn. 137, 144, 128 A. 27 (1925). The fact that servitudes are intended to bind successors in interest in the land and are generally intended to last for an indefinite period of time, lends increased importance to the writing of the servitude. *See Dent v. Lovejoy et al.* (A.C. 23009), an officially released opinion dated October 12, 2004.[8]

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[8] In *Dent*, it took ten years to interpret the terms of the servitude, in particular the precise meaning of the term "hereinafter." The Defendants here are not being treated in the same manner under the law as the parties in *Dent*. Because the Trial Court did not comply with this Court's remand order, there is nothing precise about the terms of the servitude affecting the Defendants' property. In fact, the Courts' lack of precision has transformed Defendants' deed into total ambiguity. The Defendants request that this Court,

As Defendants' Motions for Articulation (R.A. 98) and Rectification (R.A. 85) indicate, the Trial Court not only misinterpreted material facts and failed to resolve Defendants' deed reformation issues (which Plaintiff's counsel even acknowledges), but also issued an unclear judgment. For example, the Judgment File states that "[t]he plaintiff has the right to trim the hedge and other bushes ... to a maximum height of six (6) feet," which means the Plaintiff can trim the hedge and bushes to less than an inch, effectively removing them. (R.A. 81). The Appellate Court implied in footnote 8 to its opinion that, if the facts and law support it, "if the hedge and other bushes ... are kept at a height of six feet ..., there is no impingement on the plaintiff's view ...." (R.A. 18). (emphasis added). This is a materially different instruction to the Trial Court than it adopted.[9] The Judgment File further provides that the Plaintiff can enter Defendants' property "only at reasonable times and not on weekends." (R.A. 82). Thus, if the

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sitting *en banc*, take judicial notice of the fact that the City of Stamford is requiring the Defendants, for environmental reasons, to plant 33 plants in the northeast corner of their property, the restricted area.

[9] The Court gave no consideration to the fact that the bushes in question, which extend well beyond the restricted area, will now be trimmed by different landscapers at different times.

Defendants were hosting an event, a holiday gathering, a party, or a fund-raiser during a weekday, they would not be entitled to notice under the terms of the Judgment File and trimming and pruning would be permitted. In summary, the illegal injunction that was imposed on the Defendants was more favorable to the Defendants than having their rights determined by Plaintiff's counsel.

IV. *The appearance and the existence of partiality by Judge Lewis have been well documented.*

See Defendants' Motion for Disqualification of Judicial Authority. (R.A. 160). *See* paragraph (4) of Defendants' Preliminary Statement Of The Issues (R.A. 83) for a summary of the misconduct of Plaintiff's counsel.

V. *The Appellate Court Order violated the Defendants' due process, equal protection and property rights as provided for in the United States Constitution and the Constitution of the State of Connecticut, and also with the Code of Judicial Conduct.*

There is no case, in which a governmental agency, including the judicial branch, transferred private property from one private party owner to another, that has ever been held to be a constitutional exercise of government power in any state of the

union. Yet, that is exactly what has happened in this case. As the record shows, and the extrinsic evidence confirms, the City of Stamford did not create the restriction on the Defendants' property for the benefit of the Plaintiff, another private party.[10] If this Court's ruling stands, this Court will have transferred private property, in the form of a view easement, from the Defendants to the Plaintiff, both private parties.

Our founding fathers believed that the private ownership of property was an essential part of freedom. John Adams once

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[10] Recall that there is no dispute that (i) there is a triangular restriction in the northeast corner of Defendants' property; (ii) the source of that restriction is the City of Stamford's Planning Board; (iii) the bushes and the tree in the area of the restriction were there long before the restriction/easement; (iv) neither the word "easement" nor "view easement" appear in the Defendants' deed, related maps or the Dunaway-Contegni Agreement, and (v) the Plaintiff's rights regarding the restriction / easement emanate from paragraph 3 of the Dunaway-Contegni Agreement. (Opinion at R.A. 10). Paragraph 3 of Dunaway-Contegni Agreement states: "No dwelling, accessory structure or view obstruction shall be located in the triangular area 50' x 95' x110' at the Southwesterly corner of said premises." (R.A. 187). The terms of the servitude in the Dunaway-Contegni Agreement are not ambiguous. But assuming that they are, as discussed previously, if the laws are to be applied equally to all, then the Court must consider the aforementioned relevant extrinsic evidence to solve the ambiguity. Note that the concessions made to the owner's of Plaintiff's property, which do not include a view easement, are clearly noted in the Dunaway-Contegni Agreement. *See* R.A. 249-252 for additional facts and analysis.

commented that "[t]he moment the idea is admitted into society that property is not as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." Here, this Court failed to protect or determine the Defendants' property rights in connection with the restriction/easement.

WHEREFORE, for the reasons herein stated, the Defendants respectively request that the Appellate Court, sitting *en banc*, reconsider the subject Order dated October 20, 2004 (R.A. 258) and reverse its decision to dismiss the appeal as frivolous and grant such other relief as the Court deems just.

Dated at Stamford, Connecticut, this 28th day of October, 2004.

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SUPREME COURT

STATE OF CONNECTICUT

A.C. 24754

KENNETH SCHWARTZ

Plaintiff Appellee

V.

KAREN A. MURPHY and KATHLEEN A. MURPHY

Defendants Appellants

PETITION FOR CERTIFICATION

Pursuant to Practice Book ("PB") §§ 84-1 and 84-2, the Defendants Appellants ("Defendants"), Karen A. Murphy and Kathleen A. Murphy, hereby submit this Petition For Certification and the accompanying Appendix[1] to the Supreme Court for the State of Connecticut. Defendants seek certification to appeal (i) the Appellate Court's affirmation of the Trial Court's Memorandum of Decision (R.A. 75) and Judgment File (R.A. 80), both dated October 9, 2003, coupled with the Appellate Court Decision, released December 24, 2002 (R.A. 10), and (ii) the one-sentence Appellate Court Order dated October 20, 2004 (R.A. 258), which

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[1] Cites to the record Appendix To Petition For Certification will be as (R.A. x).

dismissed Defendants' appeal as frivolous, and which the *en banc* panel denied review in its Order dated December 16, 2004 Order (R.A. 282).

Statement Of The Questions Presented For Review

(1) Whether the Defendants' rights under the United States constitution and the constitution of the State of Connecticut were violated when a government agency took their private property and gave it to another private party for such party's personal use.

(2) Whether the Appellate Court's decisions violated the Defendants' rights to equal protection of the laws and due process under the United States constitution and the constitution of the State of Connecticut.

Statement Of The Basis For Certification

There are four distinct bases for certification. First, the U.S. Supreme Court has held that it is the obligation of the courts, particularly the federal courts, to protect the federal constitutional rights of individuals against governmental action. Because of the limited number of cases that it can review, the U.S. Supreme Court relies primarily on state courts to fulfill its constitutional role as

primary guarantors. In the case at bar, the Trial Court failed to safeguard the Defendants' constitutional rights and the Appellate Court failed to conduct the kind of review that is faithful to the letter of the United States constitution and cognizant of its underlying principles.

Second, there are numerous inconsistencies between the Appellate Courts' decisions in this case and other decisions from (i) Connecticut's Appellate and Supreme Courts; and (ii) the U.S. Supreme Court.

Third, there is substantial evidence in the record to show that the Appellate Court, sitting *en banc*, has departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the Trial Court, as to call for an exercise of the Connecticut Supreme Court's supervision.

Fourth, in its Order dated December 16, 2004 (R.A. 282), the Appellate Court did not disclose its reasoning for the denial of Defendants' Motion For Reconsideration *En Banc* filed on November 1, 2004 (R.A. 270). Moreover, the Appellate Court has thus far refused to inform the Defendants as to how the justices voted (R.A. 283), a circumstance prejudicial to the Defendants'

because it precludes a possible basis for certification pursuant to PB § 84-2(5). Because of the previous administrative problems associated with this case, a precise understanding of how each judge voted on that Motion is even more important than usual. In connection with Defendants' prior motions which resulted in the Orders issued on July 13, 2004 (R.A. 220-223), Paul Hartan, the Deputy Chief Clerk at the Appellate Clerk's office, confirmed that the Honorable Thomas A. Bishop and the Honorable Ian McLachlan were on the panel that issued the Orders on July 13, 2004. Yet, during oral argument in the separate zoning case,[2] Judges Bishop and McLachlan stated that they were not involved in the July 13, 2004 Orders. Finally, the Appellate Court's one-sentence Order dated October 20, 2004 (R.A. 258), which prevents analytical scrutiny against the record evidence, together with the Appellate Court Orders of July 13, 2004, sends a chilling message to all litigants that documented misconduct issues should not be raised on appeal.

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[2] *See* the Motion For Disqualification Of Judicial Authority filed on September 8, 2004 in connection with *Karen A. Murphy, et al. v. Zoning Board Of Appeals Of The City Of Stamford, et al.*, Appellate Court No. 24231, and the oral denial of the Motion on September 10, 2004. (R.A. 259).

Summary Of Facts And The Disposition Of The Case

The Defendants appealed a Trial Court decision (R.A. 19) which found that a view easement exists over Defendants' property and granted a mandatory injunction in favor of the Plaintiff. On December 24, 2002, the Appellate Court issued its opinion (R.A. 10), affirming, in part, and reversing, in part, the judgment of the Trial Court.

The Appellate Court ruled that the Trial Court "properly determined that a view easement exists over the defendants' property [which was impose by the City of Stamford's Planning Board letter of June 14, 1978][3] for the benefit of the plaintiff's [a

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[3] The record is void of any facts explaining the Planning Board's June 14, 1978 letter (R.A. 61). That letter was part of Plaintiff's Exhibit 16, which was submitted one week after the trial and was different from Plaintiff's Exhibit 16 identified at trial. The Plaintiff had certified the Planning Board file. The individual documents and maps within the file where neither certified nor authenticated. Some of the file documents did not have signatures. Further, any person could access this file without supervision and documents were removed from, and other documents inserted into, the file. Moreover, the Plaintiff called no witnesses other than himself; did no discovery; wrote an eight ¶ complaint (R.A. 4) which never mentioned the June 14, 1978 letter or the private Dunaway-Contegni Agreement or any right he was claiming under the letter

private party] property " (R.A. 12), but that "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement" (R.A. 16). The case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (R.A. 17).[4] Upon remand, the Defendants sought,

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or the Agreement. The Plaintiff subsequently acknowledged, in an *ex parte* communication, that the six foot height limitation allegation in the complaint (i.e., ¶ 5) was false (R.A. 7-8), yet he never amended his pleadings. It is undisputed that the Plaintiff has no rights under, and is not subject to the burdens of, the Defendants' deed or the referenced maps. Both the Appellate Court and the Trial Court decisions confirm that Plaintiff's complaint fails to state a claim, and that the Plaintiff did not plead a reformation of the multi-party, Dunaway-Contegni Agreement. (R.A. 196-197 at (3)).

[4] There is no dispute that (i) there is a triangular restriction in the northeast corner of Defendants' property; (ii) the source of that restriction is the Planning Board's letter dated June 14, 1978; (iii) the bushes and the tree in the restricted area were there long before the restriction/easement; (iv) neither the words "easement" nor "view easement" appear in the Defendants' deed, related maps or the Dunaway-Contegni Agreement; and (v) the Plaintiff's rights regarding the restriction/easement emanate from ¶ 3 of the Dunaway-Contegni Agreement (R.A. 15; 17 at fn 6), which states: "No dwelling, accessory structure or view obstruction shall be located in the triangular area 50' x 95' x110' at the Southwesterly corner of said premises." (R.A. 187). The terms of the servitude in the Dunaway-Contegni Agreement are not ambiguous. But assuming that they are, if the laws are to be applied equally to all, then the Court must consider the relevant extrinsic evidence (R.A.

consistent with the mandate (R.A. 13), to have the relevant extrinsic evidence considered by the court.

The Trial Court, however, first misstated the relevant extrinsic evidence and then excluded this material evidence from its consideration.[5] The Trial Court incredulously interpreted the Appellate Court's mandate to mean: "The only thing that remained for this court [upon remand] was the entry of [a non-appealable] judgment." (R.A. 179). On its face, the Trial Court's Judgment File

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51-61) to solve the ambiguity. The Appellate Court found that one could misread the applicable maps (R.A. 14), but there is no reference to any map in the Dunaway-Contegni Agreement and there are absolutely no misunderstandings in that Agreement regarding the direction of north, south, east or west. (R.A. 187). Further, the Dunaway-Contegni Agreement and the Defendants' deed make references to restrictive covenants, not to any view easement. (R.A. 15). The concessions made to the owners of Plaintiff's property at the time of the subdivision, which did not include a view easement, were clearly noted in the Dunaway-Contegni Agreement. *See* R.A. 249-252 for additional facts and analysis.

[5] The extrinsic evidence (R.A. 51-61), which is explained at R.A. 42-44, shows that (i) the June 14, 1978 Planning Board letter is the source of the restriction in the northeast corner of Defendants' property; (ii) the Planning Board never required property owners to cut existing plantings at the time when such restrictions were imposed, and (iii) the admitted, falsely alleged six foot height limitation pertains to the property located on the eastern boundary of Plaintiff's property. The Trial Court's misstatement of the foregoing is at R.A. 78-79. Ironically, the City of Stamford is now requiring the Defendants, for environmental reasons, to plant 33 plants in the northeast corner of their property, the restricted area.

(R.A. 80) failed to even address the rights of the Defendants, let alone render any determinations. This failure to comply with the Appellate Court's broad mandate is not surprising given that Plaintiff's counsel drafted the Judgment File and then submitted it to the Trial Court in an *ex parte* communication. (R.A. 160; 231). The Defendants then claimed on appeal that the Trial Court did not comply with the mandate remand of the Appellate Court. Without a reasoned decision or hearing, the appeal was dismissed as frivolous on December 16, 2004.[6]

Listed below are the deed reformation issue questions pertaining to Defendants' property, which the Plaintiff acknowledges,[7] and which were not addressed by the Judgment File and which relate directly to the Appellate Court mandate regarding a determination of rights and obligations in connection with the view easement:

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[6] Prior to the dismissal, the Trial Court and Appellate Court made rulings that were in direct conflict with the Practice Book. *See* R.A. 226 and 198.

[7] The Plaintiff stated that "[t]hese [reformation] issues ["more precise delineation of the easement area, to reform the deeds in question so that the land records are clarified, to require additional notifications, and to clarify whether or not the hedge can be trimmed below six feet"] will be heard in due time ...." (R.A. 172).

(1) Did the Trial Court's decision eliminate two easements (i.e., one in the southeast corner of Defendants' property, as the Court found in the Planning Board letter of June 14, 1978 (R.A. 61) and Defendants' deed (R.A. 182); and the one the Court found on the southwestern corner of a third party's property, as stated in the unpled Dunaway-Contegni Agreement (R.A. 185)).

(2) Did the Trial Court decision subject the Defendants' property to two easements (i.e., one in the northeast as shown on the applicable maps (R.A. 184), and one in the southeast corner of the property as noted above).

(3) Are the dimensions of the view easement as shown on the applicable maps (R.A. 184) or as stated in the Dunaway-Contegni Agreement (R.A. 185), and what is the basis for this decision.

(4) Are the notations on the relevant maps and the Dunaway-Contegni Agreement, in place for more than 20 years, to be changed to reflect the Trial Court judge's determination that the "plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet and to trim the elm tree so that it is maintained at approximately the same height as shown in exhibits 12 and 13 ...." (R.A. 81-82). If so, what is the authority for these reformations. What are the rights of the other parties to the Agreement and are they entitled to notification of the fact that the Agreement has been reformed.

The Trial Court also issued an unclear Judgment File (R.A. 80),[8] which fails to determine the Defendants' rights. In summary,

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[8] The Judgment File states that "[t]he plaintiff has the right to trim the hedge and other bushes ... to a maximum height of six (6) feet,"

the Defendants contend that the illegal injunction initially imposed by the Trial Court was more favorable to their rights than the Judgment File, which was written by Plaintiff's counsel in an *ex parte* communication.

Argument

I. ***The Defendants' rights under the United States Constitution and the Constitution of the State of Connecticut were violated when the Connecticut lower courts found that the Stamford Planning Board, a government agency, took the Defendants' private property and gave it to another private party for such party's personal use.***

The record shows, and the extrinsic evidence confirms, that the City of Stamford did not create the restriction on Defendants' property for the benefit of the Plaintiff, another private

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which means the Plaintiff can trim the hedge and bushes to less than an inch, effectively removing them. (R.A. 81). The Appellate Court implied that, if the facts and law support it, "if the hedge and other bushes ... are kept at a height of six feet ..., there is no impingement on the plaintiff's view ...." (R.A. 18, at fn 8). (emphasis added). This is a materially different instruction to the Trial Court than it adopted. Note that plaintiff acknowledges this discrepancy as well. *See* fn 7 herein. The Judgment File further provides that the Plaintiff can enter Defendants' property "only at reasonable times and not on weekends." (R.A. 82). Thus, if the Defendants were hosting an event, a holiday gathering, a party, or a fund-raiser during a weekday, they would not be entitled to notice under the terms of the Judgment File and trimming and pruning would be permitted.

party.[9] The Appellate Court, however, improperly concluded that the City imposed a view easement on Defendants' property. Even if the City did impose the easement, which it did not, it would be an unconstitutional taking of Defendants' property because, as the Court found, any public benefit from the taking would not only be secondary to the private benefit, but "difficult to discern the identity of any other beneficiary." (R.A. 17 at fn 3)."[10]

There is no case in which a governmental agency, including the judicial branch, took or transferred private property from one private party owner to another, that has ever been held to be a constitutional exercise of government power in any state of the union. Yet, as the record here shows, that is exactly what has happened in this case. If the Appellate Court's ruling stands, the private property of the Defendants, in the form of a view easement,

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[9] *See* fn 5 herein.

[10] The Appellate Court (i) found that "in granting that subdivision application, the planning board, inter alia, imposed a condition that a triangular area in the [northeast] corner of what is presently the defendants' property be subject to a view easement." (R.A. 14); and then (ii) favorably cited the Trial Court's observation that "if the view easement is not for the benefit of the plaintiff's property [a private party], it is difficult to discern the identity of any other beneficiary." (R.A. 17 at fn 3).

will have been transferred to the Plaintiff, another private party.[11]

Finally, even if it is held that, under the facts of this case, a governmental agency can take private property from one private party and transfer it to another, the relevant extrinsic evidence shows that the tree and/or the hedges would not have to be cut or trimmed in the maintenance of the easement. *See* fn 5 herein.

II. *The Appellate Court decisions violated the Defendants' rights to equal protection of the laws and due process under the United States constitution and the constitution of the State of Connecticut.*

The Defendants were denied equal protection under the laws. Specifically, the lower courts (i) effected a *de facto* reformation of Defendants' deed, not in accordance with the law for deed reformations,[12] but by use of footnotes and theories of "typographical" and "scrivener's" errors with not a scintilla of testimonial evidence, no notice or opportunity for the Defendants and other third parties to be heard on this deed reformation, and

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[11] *See Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (Conn. 03/09/2004).

[12] A deed reformation must be specifically pled or it will not be adjudicated. Plaintiff failed to plead a deed reformation. The standard of proof for a deed reformation is considerable.

with unauthenticated and unexplained documents;[13] (ii) ignored the well settled Connecticut case law which recognizes that the reversal of an order of the Superior Court renders that order completely void, and puts the parties back in the positions they occupied before the original action was brought;[14] (iii) failed to follow the remand order and the law by excluding the relevant extrinsic evidence from consideration;[15] (iv) disregarded the law that a judgment establishing the terms of the servitude should be so precise and definite in its terms that the parties may clearly understand what acts are to be done by them on the one side and the other, and how their rights are determined;[16] (v) did not follow this Court's holdings in *Texaco, Inc.* v. *Golart*, 206 Conn. 454, 464 n.7, 538 A.2d 1017 (1988), because the issues (R.A. 83) raised by

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[13] *See* fn 3 herein.

[14] *See* Judge Lavery's summary of the general rule regarding reversals in his dissent in *Mulholland v. Mulholland*, 31 Conn. App. 214, 624 A.2d 379 (1993).

[15] In its opinion, the Appellate Court clearly noted and the law states that "[i]f the meaning of the language contained in a deed or conveyance is not clear [e.g., the terms of the Planning Board letter referenced in Defendants' deed], the trial court is bound to consider any relevant extrinsic evidence presented by the parties ...." (R.A. 13). (emphasis added). *Mulla v. Maguire*, 65 Conn. App. 525, 531-32, cert. denied, 258 Conn. 934 (2001)

[16] *See Goldberg v. Krayeske*, 102 Conn. 137, 144, 128 A. 27 (1925).

Defendants on appeal (e.g., the inappropriate reformation of Defendants' deed; applicable map notations; the private Dunaway-Contegni Agreement; misapprehension of the facts; and judicial and attorney misconduct) do not fall within the definition of frivolous as set forth in *Texaco*;[17] and (vi) overlooked all of the law and the facts regarding judicial and counsel misconduct.[18]

The Defendants were also denied due process.[19] At nearly

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[17] The dismissal also conflicts with the Appellate Court's holdings in *Connecticut National Bank v. Zuckerman*, 1 Conn. App. 440, 441-42 (1993) (where the appellant filed an appeal challenging the trial court's refusal to act beyond the scope of the remand order). Here, the Defendants filed the appeal because the Trial Court did not comply with the remand order.

[18] For example, an *ex parte* communication raises a rebuttable presumption of prejudice. Once the Defendants show an improper *ex parte* communication has occurred, the burden of showing that the communication was harmless shifts to the party seeking to uphold the validity of the decision. *Daniel v. Zoning Commission of the City of Norwalk*, 35 Conn. App. 594,645 A.2d 1022. The Defendants here were harmed by the *ex parte* communication, wherein the Plaintiff's counsel drafted a Judgment File (R.A. 80), which completely ignored the Defendants' rights in connection with the restriction/easement. *See* R.A. 160; 231; 239; and by the admission of Plaintiff's Exhibit 16. *See* fn 3; also see R.A 7.

[19] "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Procedural due process rules are intended to protect people from the mistaken or unjustified deprivation of life, liberty, or property, not from the deprivation. The rules are meant to minimize substantively unfair or erroneous deprivations by enabling individuals to contest the basis upon which a state/governmental agency proposes to deprive

every stage in the case, the Defendants were denied the opportunity to contest the basis upon which the lower courts sought to deprive them of their property rights. Further, the lower courts took Defendants' property without appropriate justification.[20] For example, the Appellate Court (i) without any evidence in the record,[21] interpreted numbered ¶ 2 of the Planning Board's June 14, 1978 letter as creating a view easement for the Plaintiff, a private party; (ii) by dismissing the appeal, sanctioned the Trial Court's misstatement of the relevant extrinsic evidence, and the preclusion of same from consideration;[22] (iii) circumvented the law for deed reformations by using typographical and scrivener's error theories (R.A. 17 at fn 6); (iv) permitted the Plaintiff to recover under a cause of action not pled;[23] (v) effectively denied all of Defendants' Motions for Articulation,

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them of protected interests. Substantive due process guarantees not only that appropriate and just procedures be used whenever the government is taking away a person's life, freedom or property, but also guarantees that a person's life, freedom and property cannot be taken without appropriate governmental justification, regardless of the taking procedures used.

[20] *See* fn 5 herein for the relevant extrinsic evidence.

[21] *See* fn 3 herein.

[22] *See* fn 5 herein.

[23] Plaintiff's complaint (R.A 4) has not been amended to add the unpled Dunaway-Contegni Agreement, which all parties agreed must be done. Also *see* fn 3.

Rectification and Review;[24] (vi) in a one-sentence Summary Order without opinion (R.A 258), summarily dismissed the Defendants' direct appeal as frivolous without conducting a hearing under PB § 85-1;[25] and (vii) sanctioned *ex parte* communications (See fn 18 herein). In summary, the Appellate Court has committed such substantive and procedural violations of the law and has so far departed from the accepted and usual course of judicial proceedings in this case, and has sanctioned such a departure by the Trial Court, as to call for an exercise of the Supreme Court's supervision. In conclusion, the Defendants request that this Petition For Certification be granted on the basis of the facts and

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[24] *See* R.A. 85-181; 189-220. By denying the Motion of the Defendants', filed December 20, 2001, for review of photoduplicated record, the Appellate Court was able to dismiss Defendants' claims as not supported by the record. (R.A. 17 at fn 1). *See* PB § 68-3.

[25] The Defendants were never granted a hearing, as required by PB § 85-3, before the imposition of the ultimate sanction. Instead, the Appellate Court listed the appeal on its own motion calendar (R.A. 244) "as to whether or not the appeal should be dismissed as frivolous," pursuant to PB § 60-2, which action denied Defendants a hearing and shifted the burden of proof to the Defendants. In *Texaco, supra*, this Court held that "the burden of proof lies on the moving party to establish the frivolity of the appeal." Except for conclusory allegations, the Plaintiff has not offered a scintilla of evidence, cited any case or provided any legal analysis to show that the appeal is frivolous, nor did he rebut any of the law or facts cited in Defendants' Memorandum Of Law (R.A. 245) dated October 15, 2004.

legal issues stated above.

THE DEFENDANTS-APPELLANTS

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RETURN DATE: OCTOBER 17, 2000 SUPERIOR COURT

KENNETH A. SCHWARTZ J.D. OF STAMFORD/NORWALK

v. AT STAMFORD

KAREN A. MURPHY AND
KATHERINE A. MURPHY SEPTEMBER 13, 2000

COMPLAINT

1. The plaintiff is the owner of real property located at 60 Saddle Rock Road, Stamford, Connecticut.

2. The defendants are the owners of real property located at 68 Saddle Rock Road, Stamford, Connecticut which is adjacent to the southern boundary of the plaintiff's property.

3. The defendants property is subject to a "View Easement" in favor of the plaintiff's property as shown on Map No. 12226, entitled the "Map Showing Adjustment of Property Lines Prepared for Spring Realty Corporation, and recorded on the land records of the City of Stamford.

4. More specifically, the notes on Map No. 12226 provide that "No Accessory Structure or View Obstructions shall be Placed in this Area" (referring to the Northeast corner of the Defendant's property).

5. The defendants have continually violated this View Easement by allowing the hedge on this area to grow above six (6) feet in height and by allowing a tree to remain within the Easement area.

6. The plaintiff has repeatedly, both orally and in writing, requested that the defendants abate the situation.

7. To date, the defendants have failed to fully comply with the plaintiff's requests.

8. The plaintiff requests injunctive relief as he has no adequate remedy at law.

WHEREFORE, the Plaintiff requests the following relief

a) A mandatory injunction requiring that the defendants at all times keep their hedges trimmed at six feet or below.

b) A mandatory injunction requiring that the defendants remove the tree growing within the Easement area.

c) A mandatory injunction requiring that the defendants keep the area of the View Easement free from blockage of any kind.

d) Such other relief as the court may deem appropriate.

The Plaintiff
Kenneth A. Schwartz

By s/ J. Paul Johnson
J. Paul Johnson
Commissioner of the Superior Court
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80 Fourth Street
P.O. Box 3057
Stamford, CT 06905
JURIS NO. 52525
PHONE: (203) 357-9200

CV-00-0180296S

SUPERIOR COURT

KENNETH A. SCHWARTZ

Plaintiff

JUDICIAL DISTRICT OF STAMFORD/NORWALK

AT STAMFORD

V.

KAREN A. MURPHY ET AL

Defendants

MAY 10, 2001

PLAINTIFF'S REPLY TO DEFENDANT' S REPLY BRIEF

The Defendants in their reply brief of May 4, 201 raised two points which need to be further addressed:

1) The Defendants in their reply brief allege that the triangular area shown on the maps in evidence is located in the "northeasterly" rather than the "southeasterly" corner of the Defendants' property. The maps are in evidence and the view easement area is defined. Our reading of the map is that the area in question is the southeasterly corner on the property. This is the same reading in the restriction set forth in the deed received by the Defendants when they purchased

the property. However one describes it, it is the same view easement.

2) The Defendants also assert that the Court should not "impose an arbitrary six foot limit on the height of the privet hedges". The Plaintiff made this request in his complaint in an attempt to reach a reasonable compromise of the issue. If the Defendant is correct, then the Plaintiff requests that the Court order that the entire hedge be removed as the hedge at six feet does in fact block his view from the lower part of his property in contravention of the view easement.

Respectfully submitted, by

THE PLAINTIFF
KENNETH A. SCHWARTZ

BY s/ J. Paul Johnson
J. Paul Johnson
Commissioner of the Superior Court
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C 35B-WARRANTY DEED-SURVIVORSHIP FROM IND. OR CORP. ADGRV-I 1976 ALL-STATE LE GAL SUPPLY CO. One Commerce Drive, Cranford, N. J. 07016

To all People to Whom these Presents shall Come. Greeting:

Known Ye, *That* CHARLES McMANUS and LYNNE McMANUS of 3 Thomas Court, Valley Cottage, New York 10989

herein designated as the Grantors,

for the consideration of Nine Hundred Seventy Thousand ($970,000.00) Dollars

received to the full satisfaction of the Grantors, from KAREN A MURPHY AND KATHLEEN A. MURPHY *whose mailing address is* 68 Saddle Rock Road, Stamford, CT 06902

herein designated as the Grantees,

do hereby give, grant, bargain, sell and convey to the Grantees and to the survivor of them and to such survivor's heirs and assigns forever ALL THAT CERTAIN plot, piece, parcel of land together with the buildings thereon situated in the City of Stamford, County of Fairfield and State of Connecticut designated as Revised Lot No. 3 Area 43,503 square feet ± as shown on "Map Showing Adjustment of Property Lines Prepared for Spring Realty Corporation, Stamford, Connecticut" and filed on the Stamford Land Records as Map No. 12226.

Said premises are conveyed subject to the following:

1. Any restrictions or limitations imposed or to be imposed by governmental authority, including the zoning and planning rules and regulations of the City of Stamford.
2. The rights of others in and to the land lying below the mean high water line of the waters of Long Island Sound.
3. The effect, if any, of certain reservations, restrictive covenants, provisions and agreements set forth in a deed from the Shippan Point Land Company to Homer S. Cummings dated March 31, 1911 and recorded in Volume 150 at Page 248; and a deed to Ella W. Bohannan dated March 15, 1912 and recorded in Volume 161 at Page 129; and a deed to Emilie Stein dated October 30, 1914 recorded in Volume 183 at Page 102, of the Stamford Land Records.

4. The effect, if any, of certain restrictive covenants and agreements set forth in a certain instrument recorded in Volume 65 at Page 470.
5. Notations as shown on Maps Numbered 10716 and 12226.
6. Restriction as to view obstruction and location of accessory structures affecting the southeasterly corner of the premises as shown on said map, 12226.
7. Restrictive covenants and agreements set forth in a certain agreement between Faye Dunaway and John A. Contegni, et al, dated February 2, 1981 and recorded in Volume 2050 at Page 349.
8. Taxes to the City of Stamford next becoming due and payable.
9. Rights of Tenants in possession.

To Have and to Hold *the premises hereby conveyed with the appurtenances thereof, unto the Grantees and unto the survivor of them and unto such survivor's heirs and assigns forever, to their proper use and behoof,* ***and*** *the Grantors do for themselves, their heirs, successors and assigns, covenant with the Grantees and with the survivor of them and with such survivor's heirs and assigns, that the Grantors are well seized of the premises as a good indefeasible estate in FEE SIMPLE; have good right to grant and convey the same in manner and form as herein written and the same are free from all incumbrances whatsoever, except as herein stated.*

And Furthermore, *the Grantors do by these presents bind themselves and their heirs, successors and assigns forever to WARRANT AND DEFEND the premises hereby conveyed to the Grantees and to the survivor of them and to such survivor's heirs and assigns against all claims and demands whatsoever, except as herein stated.*

In all references herein to any parties, persons, entities or corporations, the use of any particular gender or the plural or singular number is intended to include the appropriate gender or number as the text of the within instrument may require.

In Witness Thereof, *the Grantors have hereunto set their hands and seals, or if a corporation, it has caused these presents to be signed by its corporate officers and its corporate seal to be affixed hereto, this 13th day of May, 1999*

Signed Sealed and Delivered in the presence of or Attested _by

s/Leo Gold
Leo Gold

s/Charles McManus
Charles McManus

s/(unclear signature)

s/Lynne McManus
Lynne McManus

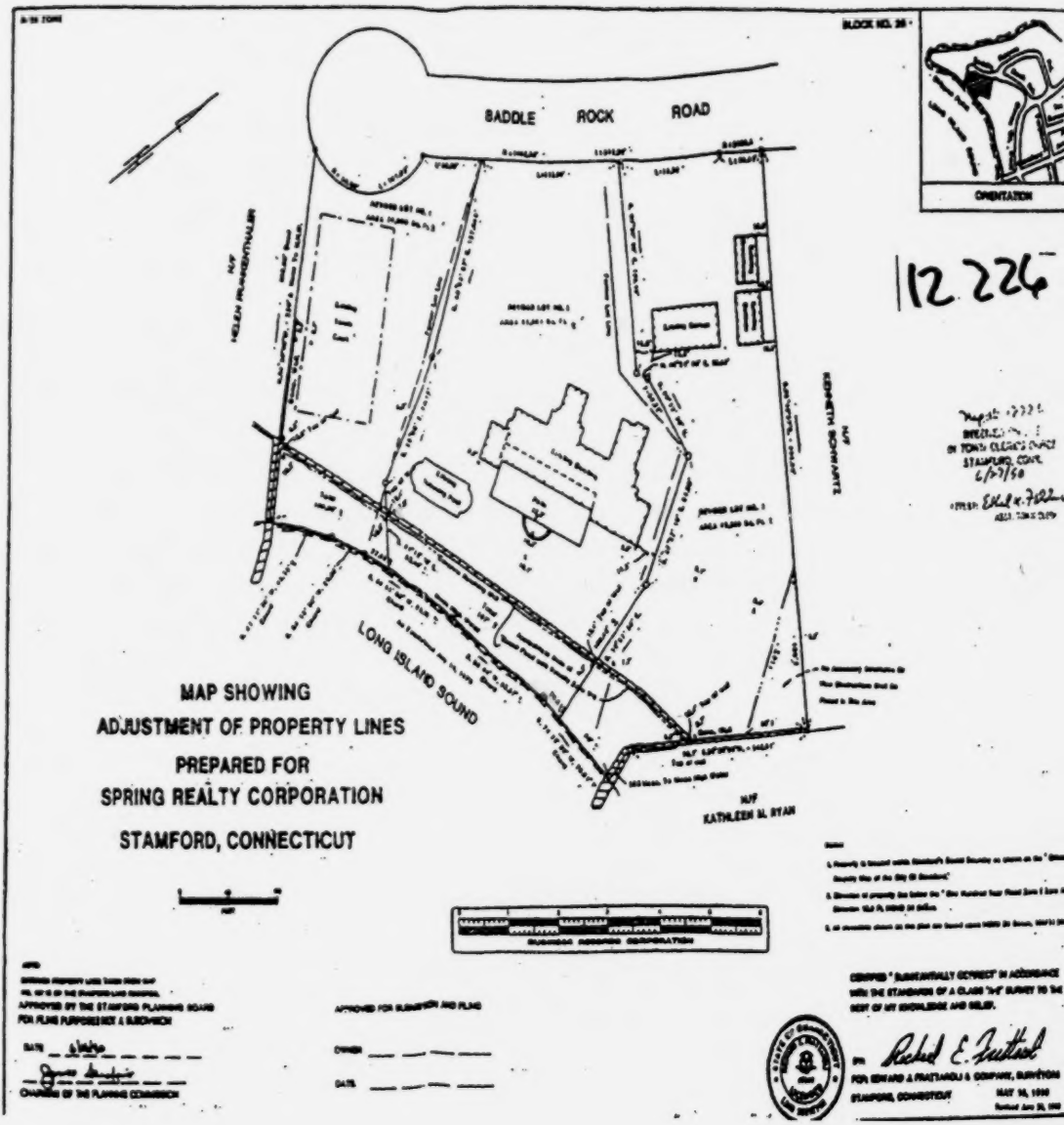
State of Connecticut

SS. Stamford

County of CONNECTICUT

The foregoing instrument was acknowledged before me this 13th day of May 1999 by CHARLES McMANUS and LYNNE McMANUS.

s/Leo Gold
Leo Gold
Commissioner of the Superior Court



A282

BEST AVAILABLE COPY

AGREEMENT made this 2nd day of February A.D., 1981, by and between FAYE DUNAWAY of the City of Stamford, County of Fairfield and State of Connecticut, hereinafter referred to as the "PARTY OF THE FIRST PART" and JOHN A. CONTEGNI, MADELINE D. CONTEGNI, DIANE B. SAXTON, GEORGE P. EGBERT and JUDITH B. EGBERT, all of the City of Stamford, County of Fairfield and State of Connecticut, hereinafter referred to as the "PARTIES OF THE SECOND PART".

WITNESSETH:

WHEREAS, the Party of the First Part is the owner of 2.94 acres of real property located on the East side of Saddle Rock Road in the City of Stamford, County of Fairfield and State of Connecticut, which premises are more particularly described in a Decd from DeLeo Brothers Development Corp. to Faye Dunaway dated February 9th, 1979 and recorded in the Stamford Land Records in Volume 1820 at Page 43; and

WHEREAS, the Party of the First Part has obtained approval from the Planning Board of the City of Stamford to subdivide the premises into four (4) separate buildings lots, which decision of the Planning Board was Appealed by the Parties of the Second Part to the Superior Court for Fairfield County and which Appeal is now pending in said Count; and

WHEREAS, the Parties of the Second Part are the owners of real property located in said Saddle Rock Road area in close proximity to the property of the Party of the First Part and which properties are more particularly set forth in the following Deeds:-

a) Jeanne S. Rich to Madeline D. Fitzgerald now Madeline D. Contegni, by Deed dated June 27, 1977 and recorded in the Stamford Land Records in Volume 1655 at Page. 256;
b) Dorothy Hauser Trompeter to Diane B. Saxton by Deed dated January 3, 1978 and recorded in said Land Records in Volume 1705 at Page 321; and

c) Charles W. Russell, et ux to George P. Egbert and Judith B. Egbert by Deed dated June 16, 1978 and recorded in said Land Records in Volume 1750 at Page 308.

and

WHEREAS, the parties hereto recognize the existence of certain restrictive covenants and agreements, which are included in the Deeds of conveyance to each of the respective properties, which were intended to maintain the nature of use, density of development and the general character of the area; and

WHEREAS, the premises now belonging to the Party of the First Part were assembled by three (3) separate conveyances from The Shippan Point Land Company to:

a) Homer S. Cummings, dated Match 31, 1911 and recorded in the Land Records of the City of Stamford in Volume 130 at page 241;
b) Ella W. Bohannan, dated March 15, 1912 and recorded in said Land Records in Volume 161 at Page 129; and
c) Emilie Stein, dated October 30, 1914 and recorded in said Land Records in Volume 183 at Page 102

and which properties included the restriction imposed by The Shippan Point Land Company in their Deeds of conveyance; and

WHEREAS, all of the parties hereto recognize that the purpose of The Shippan Point Land Company restrictions was to control the intensity of use and the development of the land and to preserve and maintain the general character of said area; and

WHEREAS, the parties hereto agree upon the desirability of controlling the future development of the area; and

WHEREAS, there is now a desire on the part of all the panties to resolve said differences giving rise to the above stated Appeal.

NOW, THEREFORE, in consideration of the Parties of the Second Part withdrawing said Appeal from the decision of the Planning Board of the

City of Stamford to the Superior Court for Fairfield County and the mutual promises and agreements herein contained the Party of the First Part hereby places upon the Land Records of the City of Stamford, the following described property:

> All that certain piece, parcel or tract of land, with the buildings and improvements thereon, situated in the City of Stamford, County of Fairfield and State of Connecticut, bounded Northerly 357 feet by land now or formerly of George P. Egbert et at, Easterly 147 feet by land now or formerly of John M. McNeil and Sheila McNeil, Southeasterly 320 feet by the waters of Long Island Sound, Southerly 236 feet by land now or formerly of Cynthia Stauffer and Westerly 376 feet by Saddle Rock Road, said dimensions being more or less. Said property being known as 74 Saddle Rock Road and containing 2.94 acres, more on less.

The terms hereof are imposed on said property and shall run with the land, not personal to the signatories hereof, but shall enure to their benefit and their heirs and assigns, to wit:

1. The above described premises shall be used for single family residents only, and no other purpose and may not be divided or subdivided into more than three (3) buildings lots. The parcel after subdivision, located on the Northerly boundary and contiguous to property now owned by George P. Egbert and Judith B. Egbert shall have an area of not less than 27,500 square feet.

2. The existing cottage located on said premises shall not be enlarged or expanded (*see below) and that in the event another dwelling is constructed on said premises, and the Zoning Regulations permit said cottage to remain, (*see below) said cottage will not be occupied by anyone except a full time employee, guests or member the immediate family of the owner of the property.

3. No dwelling, accessway structure or view obstruction shall be located in the triangular area 50' x 95' x 110' at the Southwesterly corner of said premises.

4. No first floor elevations of any dwelling to be constructed shall be below elevation 11.9 feet above mean high water level USCGS Datum.

*at its present location

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5. No dwelling shall be located within 20 feet of the property of George P. Egbert and Judith B. Egbert.

6. No dwelling shall be constructed on said premises within 100 feet of the mean high water line of Long Island

Sound as established July 14, 1976, and as shown on the subdivision map.

7. The intent of these restrictive covenants and agreements is to protect property values. The parties hereto, their successors and assigns and heirs, shall all have the right to enforce the terms of this agreement in case of its violation by such Court action as maybe appropriate, including but not limited to, application for injunctive relief. Such action may be taken by any of the parties hereto, their heirs, successors and assigns, either individually or collectively.

IN WITNESS :THEREOF, the parties hereto have hereunto set their hand and seals, the day and year first above written.

Signed, Sealed, and Delivered
in the Presence of:

s/Rector (first name unclear)
Rector

s/T.P. O'Neil
T.P. O'Neil

s/(signature unclear)

s/Charlotte Seuz

s/Faye Dunaway (L.S.)
Faye Dunaway
"PARTY OF THE FIRST PART"

s/John A. Contegni (L.S.)
John A. Contegni

s/Madeline D. Contegni (L.S.)
Madeline D. Contegni

s/Diane B. Saxton (L.S.)
Diane B. Saxton

s/George P. Egbert (L.S.)
George P. Egbert

E-mail, dated March 9, 2005, to Judiciary Committee Members

Dear Judiciary Committee Member:

The Connecticut judiciary branch of government has exhibited behaviors and decisions that directly contradict the role of an impartial judiciary. Following is an e-mail I sent to Mr. Lawlor, Co-Chair of the Judiciary Committee. I have also attached the materials referenced in the e-mail. I look forward to your comments and suggestions on how to best proceed to insure a fair judiciary for all Connecticut litigants.

Judges must know that removal from the bench is most definitely in order should they presume themselves greater than the law they are bound to uphold.

Specifically, I am referring to the tactic where dishonorable judges write opinions that appear on their face to be consistent with established precedent, but at the same time (i) misstate or omit relevant facts, (ii) misstate or fail to address an issue, or (iii) omit relevant law. When the appellate or supreme court affirms such decisions knowing the facts it is immoral, and gives the appearance, at least, that judicial misconduct is not limited to a subset of judges, but has infested the judicial system. This technique clearly violates the constitutional tenet that all litigants are to be treated equally under the law.

I am firmly convinced that appellate and supreme courts that affirm decisions that give the appearance of compliance with precedent, but which are in direct conflict with precedent when all the relevant law, facts and issues are analyzed, believe, which apparently has been the case, that their abusive conduct will never see the light of day. I hope that that will no longer be the case. Justice Brandeis had it right: "Sunshine is the best disinfectant."

I would appreciate your support in guaranteeing to all Connecticut litigants a fair and impartial Connecticut judiciary.

Karen A. Murphy
68 Saddle Rock Road
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203-324-9797
203-324-1614 (fax)
sfgrp@aol.com (e-mail)

Lawlor E-Mail

Dear Mr. Lawlor:

I am a resident of Stamford and I would appreciate it if you, as Co-Chair of the Judiciary Committee, would provide me with the procedures to make a formal complaint to the Connecticut General Assembly regarding the unconstitutional conduct of the Connecticut Supreme Court and Appellate Court.

An open public discussion of what has happened in Kenneth Schwartz v. Karen A. Murphy et al., 74 Conn. App. 286 (2002) (the "Schwartz Case") and Karen A. Murphy, et al. v. Zoning Board Of Appeals Of The City Of Stamford, et al., 86 Conn. App. 147 (the "Zoning Case") is essential if the publics' trust in the Connecticut judiciary is to be retained.

The US and Connecticut constitutional equal protection and due process violations encountered by the Murphys in the above cases are so numerous, and quite frankly are unbelievable until one digests the facts in the cases. Therefore, instead of attempting to summarize the equal protection and due process violations, I am requesting that you review the two attached Petitions for Certifications, which were both denied in March of 2005 by the Connecticut Supreme Court. I have also attached the relevant Appellate Court opinions. Further, I would be pleased to provide to you the Appendix to each of the Petitions for Certification, and verify beyond a reasonable doubt every allegation made in the two Petitions. I will also provide you with a copy of the Appellees' Oppositions to the Petitions, neither of which denies or refutes any of the allegations in the Petitions.

This is not a situation, which the Connecticut courts want you to believe, where the Murphys, the appellants, are simply unhappy with the outcome of the case. To the contrary, no fair minded person would conclude that the Connecticut appellate court and supreme court judges upheld, or were faithful to, the law in these two cases. In fact, the Connecticut judicial branch so far departed from the accepted and usual course of judicial proceedings as to call for our elected officers at the state level to implement meaningful oversight procedures over the judicial branch of government.

Schwartz Case

In the Schwartz Case, the Connecticut Supreme denied cert where the Appellate Court affirmed a lower court decision that (1) first misstated and omitted the extrinsic evidence that categorically shows that the Stamford Planning Board did not create a view easement on the Murphys' property for the benefit of Schwartz, and (ii) then found that the Stamford Planning Board, a government agency, took the Murphys' private property, in the form of a view easement, and gave it to Schwartz, another private party. Even if the Stamford Planning Board imposed the easement, which it did not, it would be an unconstitutional taking of the Murphys' property because, as the Court found, there was no public benefit, only a private benefit to Schwartz, from the taking. There is no case in which a governmental agency took or transferred private property from one private party owner to another that has ever been held to be a constitutional exercise of government power in any state of the union. Yet that is exactly what has happened in this case. The "Public Use" requirement and constitutional issues are completely ignored in the court's analysis.

Specifically, the Appellate Court (i) found that "in granting that subdivision application, the planning board, inter alia, imposed a condition that a triangular area in the [northeast] corner of what is presently the defendants' property be subject to a view easement." (see page 5-6 of the attached Opinion); and then (ii) favorably cited the Trial Court's observation that "if the view easement is not

for the benefit of the plaintiff's property [a private party], it is difficult to discern the identity of any other beneficiary." (see fn 3 of Opinion).

Zoning Case

In the Zoning Case, if the Appellate Court did not omit material facts, or just applied the rules of practice as set forth in the last paragraph of Section 1 of the decision to the Murphys, the Murphys' right to a new trail would have been granted.

It is inexplicable why lower court, appellate and supreme court judges are not held accountable when they are not faithful to the law. The most disturbing circumstances are the confirmed cases of disparate treatment being afforded certain classes of people. If a party to a cause of action has political connections, or hired the right law firm, the other party can not count on the judicial branch of government to protect his or her rights. In fact it is not uncommon, as all litigation attorneys know, that judges in reaching a desired outcome usually do not misstate the law but instead (i) misstate or fail to address an issue, (ii) misstate or omit the relevant facts, (iii) omit relevant law, or (iv) simply dismisses the case without an opinion, and there is almost no recourse. Further, as these cases demonstrate, if one raises such judicial misconduct issues on appeal, the probability of success on the other issues are negatively impacted.

Member of Congress and state legislatures are sworn to uphold and defend the U.S. and state constitutions, respectively. By not enacting legislation that protects the people from well known tactics used by judges to subvert the law, is not in keeping with their oath of office.

Elected officials should take the necessary steps and implement laws to assure a fair and impartial judiciary for all, not a select few. The people should have a viable recourse when our judges act as though they are above the law. Its sad but judges, as with most professions (i.e., accountants), cannot be counted on to police themselves.

Most, if not all litigation attorneys, can provide documentation that shows without a doubt that a subset of judges use the above tactics to subvert the law. These cases are not reported on, and the public, including members of the Connecticut General Assembly, have no idea of the injustices every day people encounter because of these tactics. The person's attorney appears every day before judges who do not follow the law, however, such attorneys cannot risk his economic future by bringing the improper judicial conduct to the public's or even the appellate court's attention. Similarly, I am fearful of what the judiciary can do to me for filing this complaint with the Connecticut General Assembly. I know what I have experienced in the court system to-date. But given what our founding fathers risked, and our men and women in Iraq are risking, for democracy, this is the least I can do to protect democracy and the rule of law in this great country and state of ours.

In summary, there are no checks and balances on judges. I am requesting that the Connecticut elected officers at the state level implement meaningful oversight procedures over the judicial branch of government, and take appropriate action, to include impeachment and removal, to assure Connecticut litigants that the travesty of injustice and inequality and total disregard for the rule of law that occurred in the above noted cases will not happen again.

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Supreme Court, U.S.
FILED
JUN 23 2005
OFFICE OF THE CLERK

No. 04-1614

In The Supreme Court of the United States

KAREN A. MURPHY and KATHLEEN A. MURPHY,

Petitioners,

v.

KENNETH SCHWARTZ,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Connecticut

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case involves the determination of the Superior Court for the District of Stamford/Norwalk at Stamford (the trial court), the Connecticut Appellate Court and the Connecticut Supreme Court that the Respondent has and is entitled to enforce a view easement over a portion of the Petitioners' property located in Stamford, Connecticut. The matter was tried before the Honorable William B. Lewis who after hearing testimony issued a Memorandum of Decision on August 30, 2001 which found that there was a view easement in favor of the Respondent over a portion of Petitioners' property as is shown on a map filed on the Stamford Land Records (Appendix at App. 5). Judge Lewis determined the location of the view easement and held that a hedge and tree located within the easement area should be trimmed by Petitioners.

On appeal, the Connecticut Appellate Court in *Schwartz v. Murphy*, 74 Conn. App. 286 (2002) on December 24, 2002, after full briefing and oral argument, upheld these findings of fact but reversed Judge Lewis' decision granting a mandatory injunction and remanded the matter to the trial court with an order to enter judgment in accordance with the Appellate Court's decision (Appendix at App. 15). A Petition for Certification filed by the Petitioners was denied by the Connecticut Supreme Court. *Schwartz v. Murphy* 263 Conn. 908 (2003).

In response, Judge Lewis on October 9, 2003 issued a Memorandum of Decision with accompanying Order complying with the Order of the Appellate Court (Appendix at App. 50). The Petitioners appealed from this Order filing appeals to the Connecticut Appellate Court and a subsequent Petition for Certification to the Connecticut

Supreme Court, both of which were denied. *Schwartz v. Murphy*, 273 Conn. 912 (2005). In addition, Petitioners filed numerous motions for review, reconsideration and articulation, which were also denied.

REASONS FOR DENYING PETITION FOR CERTIORARI

No legitimate Constitutional issues have been raised by the Petitioners:

A) The Petitioners received a full trial hearing at the trial court level and their appeals were heard and decided in a timely manner. They therefore received full due process.

B) The Petitioners' private property was not taken by the Stamford Planning Board and given to a private party as alleged. Rather, the view easement was created, as the trial court found and the Appellate Court confirmed, through an agreement between a prior developer of Petitioners' property and a predecessor in title of Respondent. The deed to Petitioners' property makes reference to the view easement and this private agreement. Therefore, there was not a potential violation of the Fifth and Fourteenth Amendments as alleged.

ERRONEOUS STATEMENTS OF FACT

Not only are no Constitutional issues validly raised, but the Petitioners misstate numerous facts and make allegations of misdeeds which Connecticut's courts have

found to be without merit. These misstatements of facts include the following:

A. That the case was decided based upon an unconstitutional action by the Stamford Planning Board in 1978. In fact, it was decided based upon the agreement of private parties.

B. That the location of the view easement was in error. In fact, the same location was found by both the trial court and the Connecticut Appellate Court.

C. That ex-parte communications were held with the trial judge. In fact, the trial court after review substantially adopted the order proposed by Respondent's counsel from whom the trial court had requested that a proposed order be submitted. The Petitioners had an equal opportunity to provide a proposed order.

D. That an alleged affidavit from the Director of the Stamford Planning Board was denied admission into evidence. In fact, the Director refused to sign the affidavit prepared by the Petitioners and the Petitioners filed an unsigned "affidavit" which was clearly inadmissable as evidence.

E. That the Judgment File issued by the trial court was "unclear". In fact, it was clear and unambiguous.

CONCLUSION

The Petitioners' numerous appeals and motions have been heard and in the final stages found by the trial court to be "without merit" (Appendix at App. 42) and by the Appellate Court to be "frivolous" (Appendix at App. 46 and

App. 48). No legitimate Constitutional issues have been raised and the Petitioners have in addition made substantial misstatements of fact as noted above. It is therefore respectfully requested that Petitioners' Petition for Certiorari be denied.

Respectfully Submitted,

KENNETH SCHWARTZ,
Respondent

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Supreme Court, U.S.
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(4)

No. 04-1614

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH SCHWARTZ

Respondent,

v.

KAREN A. MURPHY AND
KATHLEEN A. MURPHY

Petitioners.

On Petition for a writ of Certiorari to the Supreme Court of Connecticut

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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Kathleen A. Murphy, Pro Se
68 Saddle Rock Road
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(203) 324-9797
Petitioners

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I. But for the factually unsupported, unconstitutional finding by the Connecticut courts that the Planning Board took the airspace above the Petitioners' residential shorefront property for the sole express purpose of improving the water view of the Respondent, a private party, this case would have been resolved long ago. 1

II. The Appellate Court found, based on its "examination of the surrounding circumstances" that the government created and imposed the view easement in the northeast corner of the defendants' property, and that the "private agreement" relied on by the Respondent simply enabled him in particular to enforce it 2

REASONS FOR GRANTING THE WRIT 5

I. If the Takings Clause applies to any type of case in the wake of *Kelo vs. City of New London*, 545 U.S.___(2005) it applies to this one – a taking by the Planning Board from citizen A to citizen B, with no stated public purpose. 5

II. The Court should clarify what standard of review applies to takings intended to favor a particular private party and who has the burden of proof 7

III. This Case presents the Court with a unique opportunity to address the hypothetical cases posited in *Kelo* and clarify and refine the limits on the government to take private property for private use, and how such limits should be enforced, following *Kelo*. 9

CONCLUSION 10

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I. MAP LABELED –"STAFF ALTERNATE PLAN" A-1

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INTRODUCTION

I. But for the factually unsupported, unconstitutional finding by the Connecticut courts that the Planning Board took the airspace above the Petitioners' residential shorefront property for the sole express purpose of improving the water view of the Respondent, a private party, this case would have been resolved long ago.

Numbered paragraph 2 of the June 14, 1978 letter (App. 100) from the City of Stamford's Planning Board states:

> 2) Lot 3 [the Petitioners' lot] on said "Staff Alternate Plan" shall be subject to the further restriction that no accessory structures or view obstructions be placed in the triangular area 50 x 95 x 110 ft. at its southeasterly corner.[1]

It is undeniable that the trial court in two separate paragraphs interpreted the above Planning Board condition, without any evidence, as follows:

> In granting this subdivision application, the Planning Board imposed a condition that a triangular area in the corner of what is now the defendants' property was subject to view easement (App. at 8, also see App. at 9 [2])

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[1] A copy of the map labeled "Staff Alternate Plan," which was part of Plaintiff's Exhibit 16, is in the Reply Appendix included herein. This Map is referenced in the Planning Board's June 14, 1978 letter and shows that the Planning Bard created and imposed the restriction in the northeast corner, and the restriction was imposed well before the Dunaway-Contegni Agreement was executed in 1981.

[2] The Appellate Court affirmed this factually unsupported, unconstitutional interpretation of the Planning Board's June 1978 letter. (App. at 21)

And then found, as affirmed by the Appellate Court (App. at 24, fn. 3) that:

> Additionally, if the view easement is not for the benefit of the plaintiff's property, it is difficult to discern the identity of any other beneficiary. (App. at 10)

II. The Appellate Court found, based on its "examination of the surrounding circumstances" that the government created and imposed the view easement in the northeast corner of the defendants' property, and that the "private agreement" relied on by the Respondent simply enabled him in particular to enforce it.

Specifically, the Connecticut courts found that:

> ...because the deed to the plaintiff did not refer to the view easement, the plaintiff is still able to enforce this restriction or condition [i.e., the Planning Board's condition to the subdivision] because both the defendants' predecessor in title, Dunaway, and the plaintiff's predecessor, Egbert, signed an agreement establishing this restriction on the defendants' use of their property. (App. 10)[3]

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[3] This finding would be unnecessary if the court was discussing the restriction in the private agreement. Further the Planning Board in granting the subdivision imposed conditions, and the conditions are incorporated into the Defendants' deed not by reference to the June 14, 1978 letter but by the Notations on the Maps, as reflected in restrictive covenants 5 and 6 in Defendants' deed. (App. 280)

The Appellate Court also specifically found:

> There is a discrepancy, however, between the text of the restrictive covenant in the deed [referring to restrictive covenant 6, not 7, in Defendants' deed (App. 280), which, consistent with the Planning Board's June 14, 1978 letter, locates the restriction in the southeast corner of Defendants' property] and the survey maps incorporated into the deed with respect to the exact location of the easement on the

Not only is the record is void of any facts explaining the unpled and unambiguous multi-party private agreement, the record below does not support a finding that the source of the court found view easement is other than the Planning Board. Further Respondent's briefs are replete with factual statements and arguments that the Planning Board was the source of the court found view easement. [4]

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defendants' property [which locate the restriction in the northeast corner of Defendants' property]. (App. 19) (See Pet. fn. 3, for additional analysis).

And then concluded:

Accordingly, we conclude that the correct location of the view easement on the defendants' property is depicted on map nos. 10716 and 12226, i.e., the triangular area [in the northeast corner of the Defendants' property] that abuts the portion of the plaintiff's property that is adjacent to Long Island Sound.

[4]For example said briefs state:

A review of the map dated April 25, 1978, entitled "Staff Alternate plan" and referred to in the Planning Board's conditional approval clearly prohibits sight restrictions in the southeasterly corner of Lot 3, the Lot now own by defendant in the instant manner. This restricted triangular area as shown on the "Staff Alternate Plan" map is clearly adjacent to the property currently owned by the plaintiff in the instant matter and, at the time, owned by George P. Egbert. The restrictions clearly were intended to benefit Mr. Egbert's property by protecting his view of the Long Island Sound. Indeed, at the hearing on the Deleo Brothers' application for the proposed subdivision, Mr. Egbert noted his objection to the proposed subdivision and stated that one of the reasons he purchased the property was the waterfront location. (internal cites omitted)(Trial Brief, page 4)

> Because of [Mr. Egbert's] comments and based on the neighbors objections, the Planning Board then approved the subdivision on the condition...the owners...were restricted from view obstruction in the southeasterly portion of what is now Lot 3. This is clearly noted on the map entitled "Staff Alternate Plan" that was referred to in the conditional approval of the Planning Board. (Trial Brief, page 9)
>
> The neighbors then appealed the Planning Board's [conditional] approval.... In consideration of the withdrawal of that appeal, Ms. Dunaway agreed to certain restrictions on her property, including the restrictions set forth in the Planning Board's decision. (Appellate Brief, page 13)
>
> In the instant matter, the Contegni Agreement refers to a view restriction in the southwesterly corner of the three acre property. However, the Agreement also cites the exact language (other than its reference to "southwesterly") and dimensions (50"x 95"x 110") of the view restriction set forth in the Staff Alternate Plan" map as found in the Planning Board's approval of the subdivision. (Trial Brief, page 8)
>
> At trial, plaintiff introduced evidence, including the both the deeds into defendants and their predecessors in title and the City of Stamford Planning Board file [note no reference to private agreement], which designated and described the view easement in the southeast corner of the property. (Appellate Brief, page 1, fn. 1)

Note also that (i) the Judgment File (App. 35) does not even refer to the multi-party private agreement, and (ii) according to the trial court's Memorandum of Decision (App. 30) issued in conjunction with the Judgment File, the dimensions of the easement are not the dimensions shown in the multi-party private agreement, but the dimensions shown on map 1226 (App. 31), a map that the Plaintiff's has no rights in or burdens of.

Note further that the Respondent now contends, without explanation, that the Judgment File is "clear and unambiguous." (Resp. Br. 3, para. E) In fact, the Respondent has acknowledged, as

The Petitioners' claims are properly before the Court and the petition should be granted.[5]

REASONS FOR GRANTING THE WRIT

I. If the Takings Clause applies to any type of case in the wake of *Kelo vs. City of New London, 545 U.S.___(2005)* it applies to this one – a taking by the Planning Board from citizen A to citizen B, with no stated public purpose.

The majority opinion in Kelo suggests if not promises that some takings will still not satisfy the "public use" test. Justice Kennedy states :

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any reasonable person would, that the Judgment File is ambiguous and that there are many unpled deed reformation issues that were left unresolved following the courts unconstitutional interpretation of the Planning Board's June 14, 1978 letter. (see Pet. 12 and fn. 8).

[5] As noted in the Petition, the Petitioners have continuously noted the illegality of the Connecticut court's finding a view easement on the basis of state action. Petitioners were further surprised by Respondent's appellate arguments supporting such finding, (see fn. 4 herein) In Petitioners' Reply to Respondent's Appellant Brief (which reply was dated and filed well before the Appellate Court's December 24, 2002 decision), Petitioners state that: "It is not plausible or legal that the Planning Board was concerned about Mr. Egbert's alleged Easement in approving that subdivision."

Note also that Petitioners have responded in this Reply to all of Respondent's assertions in its Brief in Opposition. Respondent, however, makes an unclear assertion of misstatement of facts in paragraph B on page 3 of its Brief. Petitioners have acknowledged that the Planning Board imposed a restriction in the northeast corner of their property. (see Pet. fn. 3). It is unclear what the Respondent is alleging in paragraph B on page 3 of its Brief.

> The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

In the instant case because the lower courts found that the taking was intended to favor one particular private party- the Respondent- the taking does not comply with the U.S. Constitution or the law as set out on *Kelo.* Further the lower courts failed to articulated any public benefits and did not find that the taking was "rationally related to a conceivable public purpose."[6] The Connecticut courts' decision should not be allowed to stand because it incorrectly suggests that even the most egregious non-economic development takings are not subject to a presumption (rebuttable or otherwise) of invalidity and the courts need not review such takings under a standard of strict scrutiny.

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[6] Even if the lower courts' unstated finding was that the comprehensive plan of the Planning Board was to create an easement along the Long Island coast that would not be a valid regulatory action under the Taking Clause. *In Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987) Creating a view easement for a private party based on state action is not advancing a legitimate state interest.

II. The Court should clarify what standard of review applies to takings intended to favor a particular private party and who has the burden of proof .

This Court in *Kelo* did not foreclose the possibility that a more stringent standard of review than that announced in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) of extreme judicial deference to governmental judgments, might be appropriate in certain taking cases. Petitioners asks this Court to articulate the standards that apply to the category of takings cases (i) that do not occur in the context of a comprehensive development plan, (ii) where the procedures employed are prone to abuse, (iii) where purported public benefits are so trivial or implausible, (iv) where the identity of the private beneficiaries are known, and (v) where there are accusations of impermissible favoritism to private parties.

In the instant case, notwithstanding the fact that the Petitioners made repeated accusations of impermissible favoritism (see fn. 5 herein), the courts applied a pre se constitutional validity standard of review and ignored available relevant evidence. The Connecticut courts made no attempt to comply with Justice Kennedy's instruction:

> A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. (emphasis added) [7]

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[7] With respect to the record in the case at bar, the Respondent does

In most jurisdictions, as in the case at bar, the taking is presumed to be constitutional. Further it is incumbent upon the property owner to show that the taking was improper. This permissive attitude has encouraged governmental agencies and the courts to believe that property may be taken for pretty much any reason.

Imposing a strict constitutional level of scrutiny in the category of cases noted above and reversing the burden of proof by requiring the government to demonstrate a sufficient reason for its actions could strike a better balance between individual property owners and the perceived needs of the community. These are important questions of federal law that have not been, but should be, settled by this Court.

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not refute the known ex-parte communications noted in the Petition. (see Pet. fn 19), and cites to nothing in the record for his false assertion that: "Petitioners had an equal opportunity to provide a proposed order." (Resp. Br. 3, para. C). Further, Respondent fails to state in paragraph D, on page 3 of his Brief in Opposition, that the Petitioners, in an attempt to be heard on the ex-parte, unauthenticated admitted evidence, not only submitted a signed affidavit of Karen Murphy (App. 93) that incorporated a partially drafted affidavit for the director, which the director stated in an e-mail must be reviewed by legal counsel (App. 92), but also (i) requested that the court take judicial notice of the neighboring 1998 subdivision on the eastern border of Respondent's property (A73), and (ii) requested, as the trial court noted, that the case be reopened to admit the extrinsic evidence, or, alternatively, a "new trial" be held to analyze the extrinsic evidence (App. 33). Further the court declined to reopen the matter or to grant a new trial, not because of Respondent's newly found basis for objecting to the extrinsic evidence, but "because all issues were fully litigated" (App. 33), albeit without due process. (App. 186)

III. This Case presents the Court with a unique opportunity to address the hypothetical cases posited in *Kelo* and clarify and refine the limits on the government to take private property for private use, and how such limits should be enforced, following *Kelo*.

The majority in *Kelo* said that the "hypothetical cases posited by petitioners ['a one-to-one transfer of property, executed outside the confines of an integrated development plan'] can be confronted if and when they arise." As the case at bar demonstrates, the hypothetical posited in *Kelo* is no longer hypothetical, and presents this Court with the opportunity to confront a factually unsupported, unconstitutional taking. [8]

Finally, this Court indicated that the greatly expanded power of the government under the Takings Clause is not the power to destroy property rights, as was done in the case at bar, while this Court sits.[9]

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[8] Constitutional courts should use and not preserve their resources where, as in the case at bar demonstrates, the local government, to include the courts, is loaded against the property owner. The Respondent does not deny or refute the numerous unconstitutional equal protection and due process violations encountered by the Petitioners in this case. Incredulously, according to the Respondent due process is satisfied if (i) "[t]he Petitioners received a full trial hearing at the trial court level" – whatever that means, and (ii) "their appeals were heard and decided in a timely manner." (Resp. Br. at 2)

[9] Citing in fn. 18 *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits")

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in the Petition, Petitioners respectfully ask this honorable Court to grant the Petition.

Respectfully submitted this 8th day of August, 2005.

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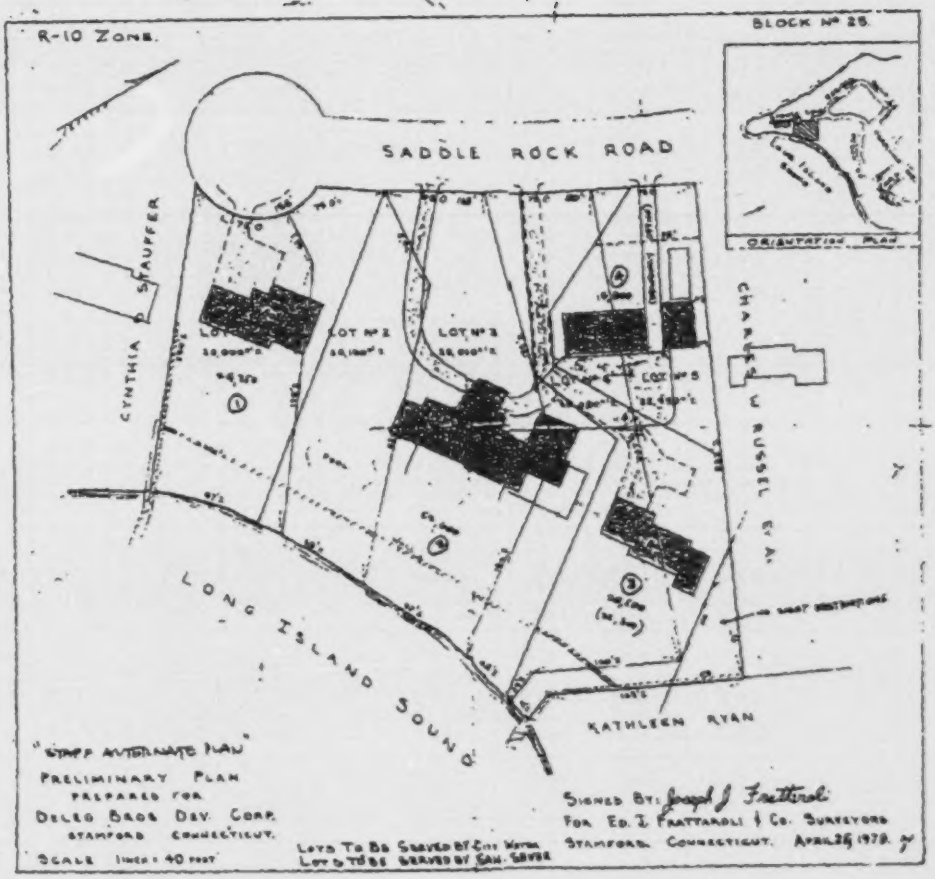
Petitioners

APPENDIX TO REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. Map Labeled –"Staff Alternate Plan" A-1


R-10 ZONE.
BLOCK Nº 25.
SADDLE ROCK ROAD
ORIENTATION PLAN
CYNTHIA D STAUFFER
LOT Nº 2
LOT Nº 3
LOT Nº 5
CHARLES E RUSSELL ET AL
LONG ISLAND SOUND
KATHLEEN RYAN
"STAFF ALTERNATE PLAN"
PRELIMINARY PLAN
PREPARED FOR
DELEO BROS DEV. CORP.
STAMFORD CONNECTICUT.
SCALE 1 INCH = 40 FEET
LOTS TO BE SERVED BY CITY WATER
LOTS TO BE SERVED BY SAN. SEWER
SIGNED BY: Joseph J Frattaroli
FOR ED. J. FRATTAROLI & CO. SURVEYORS
STAMFORD, CONNECTICUT. APRIL 26, 1978.